IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF MICHIGAN

BRIEF FOR THE APPELLANTS

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OPINIONS BELOW

The opinion of the Circuit Court for Wayne County, Michigan (A. 72-74), is unofficially reported at 84 L.R.R.M. 3008. The opinion of the Michigan Court of Appeals (A. 94-104) is reported at 60 Mich. App. 92, 230 N.W.2d 322.

An earlier opinion of the Circuit Court (A. 29-34) is unofficially reported at 73 L.R.R.M. 2237, 61 CCH Lab. Cas. ¶52,225. The opinions of the Supreme Court of Michigan in a related case, pursuant to which the earlier summary judgment in favor of appellees herein was vacated, are reported at 388 Mich. 531, 202 N.W.2d 305.

JURISDICTION

The judgment of the Court of Appeals of Michigan (A. 104-06) was entered on March 31, 1975. Appellants' application for rehearing was denied by the Court of Appeals on May 15, 1975 (A. 111). The Supreme Court of Michigan denied their application for leave to appeal by orders entered on September 17, 1975 (A. 124). The Notice of Appeal to this Court was filed on November 28, 1975. On December 5, 1975, Mr. Justice Stewart extended to February 14, 1976, appellants' time to docket the appeal. The Jurisdictional Statement was filed on February 13, 1976, and on April 26, 1976, this Court entered its order noting probable jurisdiction. ____ U.S. ____, 96 S.Ct. 1723. The jurisdiction of this Court rests on 28 U.S.C. §1257(2) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the First Amendment, U.S. Const.; Section 1 of the Fourteenth Amendment, U.S. Const.; and Section 10 of the Michigan Public Employment Relations Act (hereinafter "PERA"), Mich. Stat. Ann. §17.455(10) (1975 rev.). These are set forth in pertinent part as follows:

Constitution of the United States, Amendment I:

> Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, §1:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

Michigan Statutes Annotated §17.455(10):

> (1) It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * *.
>
> (2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.[1]

[1] The proviso to subsection (1)(c) and subsection (2) were added by Pub. Act 25, Mich. L. 1973, effective June 14, 1973.

QUESTIONS PRESENTED

1. Section 10 of the Michigan PERA authorizes agencies of the state to compel public employees to contribute financial support to unions as a condition of public employment. Does this statute on its face violate First- and Fourteenth-Amendment prohibitions of state-action which abridges freedoms of speech, association, and political autonomy?

2. The Michigan Court of Appeals held that Section 10 of the PERA was intended by the Michigan Legislature to allow public-sector unions to use coerced "service fees" for purposes other than collective bargaining, including political and ideological purposes.

(a) Did appellant public employees by their respective complaints make sufficient protests of political and other non-collective-bargaining spending by defendant union to have standing to challenge the constitutionality, as applied to them, of the statute sanctioning such expenditures?

(b) Apart from the question of the sufficiency of appellants' protests, does this statute as construed by the Michigan Court of Appeals violate by reason of overbreadth the ban of the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws abridging freedom of expression and association?

STATEMENT OF THE CASE

The appellants in these two consolidated cases are several hundred Detroit public-school teachers and counselors (hereinafter the "Teachers") who brought suit in Wayne County Circuit Court seeking declaratory and injunctive relief as to the constitutionality of a compulsory "agency-shop" arrangement between appellee Detroit Board of Education (hereinafter the "Board") and appellee Detroit Federation of Teachers (hereinafter the "Union") (A. 6-15, 39-52). Appellees entered into this arrangement in July 1969, effective

January 26, 1970 (A. 8-9, 43-44), and have continued substantially the same arrangement in successive agreements (R., Brief in Support of Claim of Appeal, Mich. Ct. App., April 11, 1974, at 12; Brief of Defendants-Appellees, Mich. Ct. App., July 19, 1974, at 1). Under the agency-shop the Teachers are compelled as a condition of employment either to join or pay to the Union each month a "service fee" in the same amount as its membership-dues (A. 9, 44).

The complaints alleged, *inter alia*, that this scheme in itself, and in its operation and effect, infringes the Teachers' freedom of association and other freedoms guaranteed them by the First and Fourteenth Amendments to the United States Constitution (A. 13-14, 49-50). Each complaint specifically alleged that dues and service fees collected by the Union were used for political and other purposes not collective-bargaining in nature of which appellants did not approve (A. 12, 48-49).

The *Warczak* case (Mich. Ct. App. Docket No. 19523) was filed on November 9, 1969 (A. 2), and the appellees immediately moved for summary judgment on the ground that the complaint did not state a claim upon which relief could be granted (A. 16, 19-20).[2] In opposition to that motion appellants made an offer of proof that the Union was using sums collected under the agency-shop scheme for political and

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[2]This motion for "summary judgment" under Mich. Gen. Ct. R. 117.2(1) is the equivalent of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or a common-law demurrer. Crowther v. Ross Chemical & Mfg. Co., 42 Mich. App. 426, 429-31, 202 N.W.2d 577, 580 (1972). *See* Bielski v. Wolverine Insurance Co., 379 Mich. 280, 283, 150 N.W.2d 788, 789 (1967):

> For the purpose of that motion, both at the trial and appellate levels, every well-pleaded allegation in the complaint is assumed to be true.

For the sake of clarity, the Teachers will hereinafter use the term "demurrer" to describe this motion.

other non-collective-bargaining activities to which the Teachers objected (A. 21-23). This offer of proof was supported by affidavits of several individual Teachers setting forth facts within their personal knowledge, with documentation, respecting the Union's regular and substantial use of funds for specific political, legislative, and social purposes, and the affiants' opposition to such expenditures (*e.g.*, A. 24-28).

Holding that "the agency shop provision is not repugnant to any statute or constitutional provision" (A. 34), the Circuit Court entered an order granting dismissal for failure to state a claim (A. 35-37). On appeal, on December 28, 1972, the Michigan Supreme Court vacated that order and remanded to the Circuit Court for further proceedings consonant with the intervening decision in *Smigel v. Southgate Community School District*, 388 Mich. 531, 202 N.W.2d 305 (1972) (A. 59-60). *Smigel* had held that an agency-shop arrangement such as the one in the instant case "is clearly prohibited by Section 10 of the Public Employment Relations Act, as of necessity either encouraging or discouraging membership in a labor organization." 388 Mich. at 543, 202 N.W.2d at 308.

The *Abood* case (Mich. Ct. App. Docket No. 19465) had been filed in Wayne County Circuit Court on April 23, 1970 (A. 3), and held in suspension pending the outcome of the *Warczak* appeal. Before any further action was taken by the Circuit Court in either case, Section 10 of the PERA was amended on June 14, 1973, by Public Act 25 of 1973 expressly to authorize agency-shop arrangements requiring public employees to pay service fees equivalent in amount to union membership-dues (A. 76). The Union and Board then moved for dismissal of both cases for failure to state a claim upon which relief could be granted (A. 68).

The Circuit Court granted appellees' demurrer in both cases, specifically adjudging that Public Act 25 "authorizes agency shop agreements in public employment" and "that said agency shop clause does not contravene the Constitution of the United States" (A. 75-77). The Teachers' motion for rehearing was denied by the Circuit Court (A. 78).

The Teachers' subsequent appeals in *Warczak* and *Abood*, contending that the trial court had erred in upholding the constitutionality of the agency-shop (A. 80-85), were consolidated by the Michigan Court of Appeals (A. 79). In a *per curiam* decision issued March 31, 1975, that Court held that the requirement of payment of service fees by the Teachers does not infringe their First- and Fourteenth-Amendment freedoms of speech and association, and that, though the use of funds collected under a statutorily authorized agency-shop arrangement for non-collective-bargaining purposes "could" abridge appellants' First-Amendment rights, they are not entitled to relief on this basis (A. 100-04). Rehearing was denied (A. 111).

The Michigan Supreme Court declined to take jurisdiction (A. 124) of the Teachers' timely application for leave to appeal which had been brought in order to contest the Court of Appeals' failure to declare Public Act 25 of 1973 and the agency-shop arrangement violative of the federal Constitution (A. 112-17). This Court then noted probable jurisdiction of appellants' appeal from the decision of the Court of Appeals. ____ U.S. ____, 96 S.Ct. 1723.

SUMMARY OF THE ARGUMENT

This Court has been urged all too often to interpose the shield of the First Amendment between the aggressions of politically powerful majorities and the rights of politically weak minorities. This is another such case. Perhaps it is even more challenging to the wit and the courage of the Court than have been its many predecessors. For never before have the claims of the majority at first sight seemed so strong and the defenses of the aggrieved individuals so weak. But only at first sight. Examination and reflection will demonstrate that the claims which at first seem so strong are in the end

without rational or constitutional foundation, while the defenses which at first seem so weak grow the more constitutionally, morally, and rationally impregnable the more they are probed.

The majority in this case has used the power of the state in a particularly repugnant way. It has not been content to impose its will upon the dissident individuals, to compel them to yield to the majority their fundamental right to make their own employment contracts. Not satisfied with suppression so egregious, the majority has insisted that the oppressed individuals also be made *to pay* for the pains and penalties imposed upon them. And the State of Michigan has complacently acquiesced in–indeed, *authorized*–this extortionate process. Not even the chattel slaves before Emancipation were compelled to pay for the dubious privilege of having their employment relations controlled by someone else.

But there is more. The oppression here, like oppression everywhere, serves no valid public interest. On the contrary. With the financial means exacted from the dissenting minority the aggressive majority will strengthen its economic and political position and thus enhance its power to hold the community at ransom whenever the taxpayers resist its demands. The nonconforming individuals are the immediate target of the ambitious majority; but the community will be the ultimate victim if no check is placed upon the authority of the state to enable the aggressors in this case to wax invincibly strong by the exercise of the special privilege to make unwilling persons–the Teachers here–contribute to their financial support.

The case is this: the State of Michigan, the Detroit Board of Education, and the Detroit Federation of Teachers have in combination sought to compel the Teachers to pay dues or fees to the Union as a condition of public employment. Neither the statute which authorizes such compulsion, nor the Board in exercising it, has in any way limited the uses to which the Union may put the dues or fees so exacted. Indeed

the Michigan courts have expressly held that the Union may use the funds for purposes other than collective bargaining. It must therefore be presumed as an operative fact in this case that the Union may use the funds as it pleases, subject only to its own constitution and bylaws.

The Teachers maintain that what the State of Michigan, the Board, and the Union are doing, or trying to do, to them is wrong–fundamentally, indefensibly, unconstitutionally wrong. And they believe that an unbroken line of decisions in this Court, a line of decisions which has animated the Bill of Rights in the manner designed by its draftsmen, fully supports their belief.

We pray the Court's indulgence for the length of the argument and exposition which follow. Had the courts below checked their indecent haste to dispose of this case with the least possible consideration, had we been able to get from any of the Michigan courts in which we sought relief a straightforward and unequivocal opinion concerning the merits of our claims, it would not have been necessary to cover in scrupulous detail every phase of the case, substantive and procedural, as we have done here. But the courts below have been intent upon smothering the issues that the Teachers have raised, despite their profound significance, in a series of summary dismissals.

The decision from which we directly appeal is a masterwork of vagueness, irrelevancy, and opacity. And from such a decision, the Supreme Court of Michigan flatly denied the Teachers an appeal, although a case more sensitively touching at once the personal freedom of Michigan civil servants and the fundamental political interests of the Michigan electorate can scarcely be imagined.

We regret the length but we make no apologies for the soundness of our argument. We have scrupulously dealt with every arguable contention against the Teachers that we could imagine, including many omitted by the other side and by the Michigan courts. We have delved deeply into all the decisions

of this and other courts which might have a possible bearing on the case. We have accorded the Constitution of the United States and the Bill of Rights the regard, the careful scrutiny, which the other side and the courts below have denied them. We believe that the Teachers' case is constitutionally impregnable.

ARGUMENT

I.

Conditioning public employment on a surrender of First-Amendment rights is unconstitutional on its face, hence in compelling them to associate with the Union by providing financial support to its political and economic activities, the Board and the State of Michigan abridged the Teachers' constitutional rights.

Private employers are constitutionally free to condition offers of employment virtually at will; but government, when acting as employer, must operate generally within the same system of constitutional restraints applicable to it in its role as rule-maker and law-enforcer. Part I.A., *infra*. Thus while private employers are constitutionally at liberty to condition employment on either membership or nonmembership in a labor organization, any government agency which limits employment to union members, or to employees who agree to refrain from joining or supporting unions, runs afoul of the First- and Fourteenth-Amendment strictures against state-action abridging freedom of association. When a government or one of its agencies limits public employment to only those persons who are willing financially to support a labor organization, and when it further appears that the financial support will be used to promote political activities opposed by those from whom it is exacted, political autonomy and free speech, as well as free association, are abridged. Part I.B., *infra* p. 18.

A.

Unlike private employment, public employment may not be conditioned upon a waiver or surrender of constitutional rights.

Resolution of the ultimate issue posed by this case turns upon the classic distinction, where constitutional restraints are involved, between the activities of private persons and of governmental authorities. Such restraints as private persons suffer originate in either the common law or valid statutes. As a general rule, the Constitution and particularly the Bill of Rights and the Fourteenth Amendment do not limit the freedom of action of private persons. They limit government. The provisions of the Fourteenth Amendment all have reference to state-action exclusively, and not to any action of private individuals. *Virginia v. Rives*, 100 U.S. 313, 318 (1880). Speaking for the Court more recently, Mr. Justice Stewart said:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. See *Columbia Broadcasting System, Inc., v. Democratic National Committee*, 412 U.S. 94. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

Hudgens v. NLRB, ____ U.S. ____, ____, 96 S. Ct. 1029, 1033 1976); *cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). To the same effect: *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *Talton v. Mayes*, 163 U.S. 376, 382, 384 (1896); *Withers v. Buckley*, 61 U.S. (20 How.) 84, 89-91 (1858).

Over the years, this Court has frequently had to grapple with the fact that state-action and private action are upon occasion so intermingled that the constitutional distinction

between them either disappears or can be maintained only with considerable difficulty. That the distinction persists in a meaningful sense is demonstrated, however, by the Court's reaffirmation recently in *Hudgens, supra*, and its antecedents over the past forty years or so.[3]

Professor Archibald Cox fixed the point with great precision when he said that "[t]he only rights exactly correlative to the duties imposed by the Fourteenth Amendment are rights against the state, not against private individuals." "Foreword: Constitutional Adjudication and the Promotion of Human Rights", 80 *Harv. L. Rev.* 91, 110 (1966). For the original juridical analysis from which Professor Cox derived this formulation, *see* W. N. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* 35 *et seq.* (Yale Press ed. 1923).

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[3] Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972); Central Hardware Company v. NLRB, 407 U.S. 539 (1972); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); James v. Valtierra, 402 U.S. 137 (1971); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Evans v. Abney, 396 U.S. 435 (1970); Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Cooper v. Aaron, 358 U.S. 1 (1958); Terry v. Adams, 345 U.S. 461 (1953); Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); James v. Bowman, 190 U.S. 127 (1903).

For helpful analyses and reviews of the foregoing developments, *see* Burke & Reber, "State Action, Congressional Power and Creditors' Rights: an Essay on the Fourteenth Amendment", 46 *So. Cal. L. Rev.* 1003 (1973); Lewis, "The Meaning of State Action", 60 *Col. L. Rev.* 1083 (1960); Wechsler, "Toward Neutral Principles of Constitutional Law", 73 *Harv. L. Rev.* 1 (1959).

1.

Private employers are at liberty under the Constitution to condition offers of employment on either membership or nonmembership in any private association, including labor organizations.

As a consequence of the distinction between state-action and private action, there has never been any question of the legal privilege of private employers (and employees) to condition their offers and acceptances of employment contracts in any manner agreeable to both parties—always providing that the conditions run afoul of no specific statutory or common-law proscription. *Cf.* 6A *Corbin on Contracts* §§1373 *et seq., esp.* §§1376, 1419, 1420, 1470 (1962). This Court reviewed the relevant common-law principles in *Hitchman Coal & Coke Co. v. Mitchell*, and with the concurrence of dissenting Justices Holmes and Brandeis on this point, held that employers were as privileged to condition their offers of employment on nonunion membership[4] as employees and unions were to insist that union membership be made a condition of employment.[5] 245 U.S. 229, 250-52, 271-72 (1917).

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[4] *See also* Andrews v. Louisville & N.R.R., 406 U.S. 320, 324 (1972); Truax v. Raich, 239 U.S. 33, 38 (1915). That *Hitchman* reflected a valid, even standard, common-law approach is demonstrated by its essential similarity to the point of view expressed in South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A.C. 239 [House of Lords].

[5] *E.g.*, Williams v. Quill, 277 N.Y. 1, 12 N.E.2d 547, *appeal dismissed*, 303 U.S. 621 (1938); Curran v. Galen, 152 N.Y. 33, 46 N.E. 297 (1897), *abandoned in* Jacobs v. Cohen, 183 N.Y. 207, 76 N.E. 5 (1905), *on the authority of* National Protective Ass'n v. Cummings, 170 N.Y. 315, 63 N.E. 369 (1902). *See also* Smith v. Bowen, 232 Mass. 106, 121 N.E. 814 (1919); Shinsky v. O'Neil, 232 Mass. 99, 121 N.E. 790 (1919); Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909), *closed shop limited to "open" unions in* James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944).

See generally 1 L. Teller, *Labor Disputes and Collective Bargaining* §170 (1940); Witmer, "Collective Labor Agreements in the Courts", 48 *Yale L. J.* 195 (1938); Note, 24 *Va. L. Rev.* 567 (1938).

So broadly were these privileges conceived before the enactment of such legislation as the National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1970), that the Court then held them to be constitutional rights, as well—immune to legislative infringement by either the federal government or the states. Thus both federal and state statutes forbidding contracts making nonunion membership a condition of employment were held unconstitutional. In *Adair v. United States*, 208 U.S. 161 (1908), this Court struck down the provisions of the federal Erdman Act outlawing such contracts. And in *Coppage v. Kansas*, 236 U.S. 1 (1915), the Court invalidated a similar Kansas statute.

The foregoing conception of constitutional right has been largely abandoned. *Texas & N.O.R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 570-71 (1930). And since *Adair*, *Coppage*, and *Hitchman*, the Court has upheld the authority of the states to enact "right-to-work" laws which deny to private employers the privilege of conditioning employment-offers upon either membership or nonmembership in any labor organization. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). The fact remains, however, that such limitations upon employers are statutory in character—not constitutional. None of the multitude of legal developments since *Adair*, *Coppage*, and *Hitchman* has weakened the principle that the Constitution itself in no way limits the contracting privileges of private employers. As pointed out by the three-judge federal court in *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969),

> [t]here is nothing in the United States Constitution which entitles one to have a contract with another who does not want it.

To the same effect, *see Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972); *Van Zandt v. McKee*, 202 F.2d 490, 491

(5th Cir. 1953). This Court was applying the same constitutional principle in an analogous factual context when it upheld the right of the publisher in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), to refuse to agree to print certain matter.

In sum, by the fundamental and inherent nature of our system, however else the conduct of private parties may be restrained—by common-law tradition or express statutory limitation—*the Constitution and the Bill of Rights do not restrain them*, in either the general area of contract or in the particular area of the employment contract.

2.

Restrained as they are by the Constitution, governments may not condition public employment or other public benefits upon a cession of constitutional rights, either directly by legislation or indirectly by administrative action.

The constitutional status of governments generally and of governmental employers particularly is sharply distinct from that of private persons, including private employers. At this late date, it would be merely pretentious to document extensively the well-founded fears of government power which brought the Bill of Rights into being. As was his way, our first president gave succinct expression to both an abiding truth and a then widely shared conviction when he said in his Farewell Address that:

> Government is not reason, it is not eloquence—it is force. Like fire it is a dangerous servant and a fearful master; never for a moment should it be left to irresponsible action.

The Bill of Rights grew out of such cognitions.[6] To paraphrase President Woodrow Wilson, the history of the Bill of Rights, "like [t]he history of liberty is a history of the limitation of governmental power, not the increase of it." Address to the New York Press Club, *quoted in* E. D. Cronon, *The Political Thought of Woodrow Wilson* 188 (1965).

Hence it has long been taken for granted that the First Amendment is designed specifically to limit the power of all government, not only the power of the federal government, but by way of the Fourteenth Amendment, the power of state governments and local authorities as well. *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943); *and see Gideon v. Wainwright*, 372 U.S. 335, 340-45 (1963) (Sixth-Amendment safeguards apply to the states, along with other basic rights, through the Fourteenth Amendment).

Over the last generation and more, this Court has held that no government—local, state, or federal—may condition either public employment or any other public benefit on a waiver or surrender of any one of the rights guaranteed by the First and Fourteenth Amendments. *E.g., Board of Regents v. Roth*, 408 U.S. 564 (1972) (public employment); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (*semble*); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation benefits); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) (public employment); *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958) (tax exemption). As Mr.

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[6] "'The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors. . .' In 1951, in his opinion in *Dennis*, Mr. Justice Frankfurter, in quoting that statement, said of it [341 U.S. at 524], 'That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years.'" Meiklejohn, "The First Amendment is an Absolute", in Kurland, ed., *Free Speech and Association: The Supreme Court and the First Amendment* 21 (1975).

Justice Stewart said in *Cafeteria & Restaurant Workers, Local 473 v. McElroy:* "The state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." 367 U.S. 886, 897-98 (1961).

It is now well settled, too, that conditioning any public benefit on a surrender of First Amendment rights is *prima facie* unconstitutional as well when judicial or administrative authorities impose such conditions as when legislatures do. *E.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-79 (1972); *Watkins v. United States*, 354 U.S. 178, 188 (1957); *Barnette*, 319 U.S. at 637. The same principle controls in respect of admissions to the bar, a subject normally under the supervision of the courts. Mr. Justice Black summarized the relevant doctrine in a manner particularly well suited to a proper understanding and disposition of the issues of this case when he said that:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent v. West Virginia*, 129 U.S. 114. Cf. *Slochower v. Board of Education*, 350 U.S. 551; *Weiman v. Updegraff*, 344 U.S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas v. Noble*, 261 U.S. 165; *Cummings v. Missouri*, 4 Wall. 277, 319-320. Cf. *Nebbia v. New York*, 291 U.S. 502. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356.

Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (footnote omitted).

B.

The requirement of financial support to the Union as a condition of their public employment infringes the Teachers' freedom of speech and their political and associational rights under the First and Fourteenth Amendments.

The present point constitutes the foundation of the Teachers' case. We establish here (1) that Michigan has conditioned the Teachers' employment on payment of union-dues, without limitation upon the uses to which the Union may put the funds thus exacted. We proceed then to demonstrate (2) that public employment may not be conditioned upon a waiver or surrender of First- and Fourteenth-Amendment liberties of speech, association, and political autonomy. And we show (3) that since public-sector unions are inevitably involved in demonstrably political activities at every level, forcing the Teachers financially to support the Union in spite of their opposition to its political activism constitutes an *a fortiori* abridgment of their freedom of speech and of their associational and political liberties.

1.

Under color of the Michigan PERA, the Board has required the Teachers to pay full dues or fees to the Union as a condition of employment, with no limit upon the uses to which it may put those dues and fees.

Section 10 of the Michigan Public Employment Relations Act authorizes all state employers to make agency-shop agreements with unions certified as exclusive-bargaining representatives in appropriate bargaining units. The statute does not limit in any way the uses to which exclusive-bargaining representatives may put the dues and fees thus exacted from unwilling state employees as a condition of their employment. It provides, in terms, that all employees in the bargaining unit

may be required to "pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Mich. Stat. Ann. §17.455(10) (1975 rev.).

After perusing the legislative history of §10, as amended (A. 85-94), the Michigan Court of Appeals held that the section was intended by the Michigan Legislature to allow public-sector unions to use the service fees thus derived to finance not only activities associated with collective bargaining but their political and ideological causes as well (A. 100-01). Since the Michigan Supreme Court declined review of this determination (A. 124), the decision of the Michigan Court of Appeals stands as the authoritative construction of §10 of the PERA. This Court must therefore assume in passing upon the constitutionality of §10 that it authorizes public employers and unions to compel unwilling public servants as a condition of their public employment to finance the partisan political and ideological activities of such unions, as well as their collective-bargaining activities. In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), this Court construed §2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh (1970)—a provision identical in most respects to PERA §10—as prohibiting the use of compelled dues and fees for political or ideological purposes. That option is unavailable here.

The stark posture in which the case comes to this Court is no fault of the Teachers. Promptly after §10 was amended to authorize the agency-shop, the Board and the Union entered a demurrer to the Teachers' complaints (A. 68). Despite the Teachers' opposition to the motion (A. 69-70), despite their allegations, which should have been taken as true, that the Union was using agency-shop dues and fees for political and ideological purposes (A. 12, 48-49), and despite the offer of proof and supporting affidavits to the same effect already in the record (A. 21-28), the demurrer was granted and affirmed

(A. 75-77, 100-04). If the case comes here bereft of that factual fulness for which this Court has quite properly shown a preference where grave constitutional questions are raised, the blame must fall upon the appellees and the Michigan courts; and the Teachers, who have done whatever they could to develop a record of adequate amplitude, should not be denied the opportunity to vindicate their constitutional rights.

The Board, the Union, and the courts below attempt to justify their precipitate disposition of this case on the ground that a prior decision of this Court has in a way largely settled the question of the basic constitutionality of such statutes as §10 of the Michigan PERA. That prior decision—the sole authority relied upon substantively by appellees and the courts below—is *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). We shall show in Part III., *infra* p. 187, that *Hanson* has almost nothing to do with this case, and that whatever logical, legal, and constitutional relationship there may be between the two is certainly of no help to appellees. To the degree that it is relevant here, we shall show, *Hanson* provides support for the Teachers, not for the Board or for the Union.

While we believe that *Hanson* does not dispose of this case, one way or the other, we are convinced that a long line of other decisions of this Court, especially those coming after the 1956 decision in *Hanson*, *are* dispositive and have been considered so by the inferior federal courts all over the country in a series of cases indistinguishable in principle from the present one. To those decisions of this Court and of the inferior federal courts we now turn.

2.

Ruling principles developed in this Court, the uniform course of relevant decisions in the inferior federal courts, and the plain purpose of the First Amendment all dictate the conclusion that the state-action here challenged abridges the Teachers' freedoms of association, speech, and political autonomy.

This is a true and pure state-action case.[7] The Michigan Legislature has authorized all the public authorities in the state to compel all the public employees in the state to pay dues and fees to certified unions as a condition of public employment. And the Board has proceeded to exercise that authority by agreeing with the Union to discharge any teacher who refuses to pay the Union for the privilege of continuing to teach in the Detroit public schools.

We have already shown that, as a general principle, action by any governmental authority which conditions public employment or other public benefits on a surrender of First-Amendment rights is *prima facie* unconstitutional. Our task now is to try this general principle for fit to a new set of facts. We believe that if fairness, logic, common sense, the high purpose of the Bill of Rights, the prior decisions of this Court, and the applications of those decisions by the inferior federal courts—if all these sovereign criteria are disinterestedly consulted, the Court can conclude only that the Teachers' constitutional rights have been abridged. We propose to elucidate this contention by demonstrating that:

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[7]The Board "is a body corporate operating the schools situated in the City of Detroit, Wayne County, Michigan, as a school district under the general school laws of the State of Michigan" (A. 7, 43). Michigan school districts are agencies of the state. Attorney General v. Detroit Bd. of Educ., 154 Mich. 584, 590, 118 N.W. 606, 609 (1908); Attorney General v. Loweey, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902); Mich. Const. art. VIII, §2.

a. Since the decision in *Hanson*, 351 U.S. 225 (1956), the law of the First Amendment has undergone a marked development, particularly in respect to the speech, political, and associational rights of public employees–so marked that "the minimal analysis in the Court's opinion" in *Hanson* (to adapt the observation of Mr. Justice Brennan, dissenting, in *Washington v. Davis*, 44 U.S.L.W. 4789, 4799 (U.S. Jun. 7, 1976)) cannot fairly be regarded as dispositive here.

b. On the strength of the conception of the First-Amendment rights of public employees developed over the last twenty years, the inferior federal courts all across the nation have held with perfect unanimity and fidelity to the principles elaborated here that no state authority may condition public employment on a surrender of the right of public employees to associate with labor organizations if they wish to do so.

c. Just as freedom of speech and of the press necessarily imply the right *not* to speak and *not* to publish, so too freedom of association necessarily implies the right *not* to associate. As a consequence, if the inferior federal courts have been faithful to the Constitution in holding that public authorities violate the First Amendment when they discharge public employees for having chosen to join labor organizations, it would be a travesty of law, logic, policy, and justice to hold that the same public authorities may constitutionally discharge–or agree with unions to discharge–public employees for having chosen to exercise their freedom of association by *refusing* to affiliate with any trade union.

d. Choosing *either* to extend financial support to or to withhold it from any organization is *mutatis mutandis* as definitely an exercise of freedom of association as choosing to accept or to reject formal membership therein would be; hence the Michigan Legislature in authorizing, and the Board in establishing, the requirement that the Teachers pay agency-shop fees to the Union as a condition of their employment, should be regarded as having violated their First-Amendment rights exactly as they would have done had they discharged the Teachers for having chosen to join and to pay dues to a union.

e. Quite clearly, Michigan could not compatibly with the Constitution compel its employees to join or pay dues to a particular religious sect, or some favored private charity, or a political party, or any other private and voluntary association, *e.g.*, Common Cause. The infringement of political, religious, associational or speech-rights in any such case would be perfectly obvious. But if that much may be taken as established, then certainly the state should not be authorized to do indirectly through the vagaries of collective-bargaining elections, and of the bargaining stances of diverse state agencies such as the Board, what it could not constitutionally do directly. Surely, unions and their voluntary members have no greater claim to sovereign power than the State of Michigan, or, for that matter, the United States government, has. The state ought not to be able to gain the authority to diminish the freedom of association of some of its employees by enhancing the powers of compulsion of others. Pro-union employees have no greater constitutional rights than do those who object to union representation. As Mr. Justice Marshall has recently said for the Court, "this Court would reject * * * [the] contention if it were made * * * that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause * * *." *City of Charlotte v. Local 660, Firefighters*, 44 U.S.L.W. 4801, 4802 (U.S. Jun. 7, 1976).

a. Public employment may not be conditioned on a surrender of constitutional rights.

(i) At a time when government was, as Thornton Wilder once said, "small and funny", few supposed that the Fourteenth Amendment and the Bill of Rights protected persons against anything other than positively prohibitory or penal kinds of governmental action. As employer rather than as ruler, government was considered indistinguishable from private employers, and thus possessed of the same kind of

authority that private employers had—to condition employment (or other beneficial arrangements) largely at will. *Supra* pp. 10-15. A frequently quoted example of this point of view is the statement by then Judge Holmes of the Massachusetts Supreme Judicial Court:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892). It would be at least injudicious and at most positively wrong to conclude that there is nothing left of the view Holmes expressed. It remains as true as ever, for example, that there is no such thing as a right (in the Hohfeldian sense of an enforceable claim[8]) to any particular government job or other benefit. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). Moreover, in certain areas of vital governmental activity, such as military installations, government as a necessary incident to its sovereign obligations "has traditionally exercised unfettered control." *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961). Finally, as the Court has quite recently reaffirmed, the transcending common interest in insulating the bureaucracy from undue political influence and in preventing it from becoming itself "a powerful, invincible and perhaps corrupt political machine" constitutionally authorizes governments to place limitations on the political activities of their employees which would clearly be unconstitutional if extended to the citizenry at

[8] *See* W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 23-31 (Yale Press ed. 1923).

large. *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 566 (1973) (federal government); *Broadrick v. Oklahoma*, 413 U.S. 601, 604 n.2 (1973) (state governments).

Government is no longer small; it is not always funny any more, either. It is huge and overpowering. The fifteen million or more federal-, state-, and local-government employees constitute almost twenty percent of the total labor force of the country. This sobering state of affairs has brought before the Court a large number of complaints from public servants. And these cases have dramatically demonstrated how, if treated as just another employer, government might, by means of oppressive conditions of employment, succeed while occupying *that* rôle in suppressing on a grand scale the same range of civil rights and civil liberties which, among the citizenry at large, remains reasonably secure against frontal attack by government *qua* government.[9]

From its consideration of such cases, the Court has come to the conclusion that, in the most precise juridicial and constitutional terms, governments are not, even in the employment relationship itself, *merely* employers in the ordinary sense. They draw all resources and all authority from the

[9] For representative cases, *see* Perry v. Sindermann, 408 U.S. 593 (1972); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sherbert v. Verner, 374 U.S. 398 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Cafeteria & Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886 (1961); Speiser v. Randall, 357 U.S. 513 (1958); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

And see Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law", 81 *Harv. L. Rev.* 1439, 1461-62 (1968), for a discussion of how the enormous increase in public employment has challenged the continued constitutional relevance of the Holmes dictum in *McAuliffe*.

people, including the resources and the authority expended and exercised in providing employment (and other benefits). That being true, the Court has concluded that governments must be bound by essentially the same constitutional restraints when they act as employers or benefactors as they are when they perform their more traditional functions of rule and command. Thus:

> In *Speiser v. Randall*, 357 U.S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly." 357 U.S., at 526. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.*, at 518. Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Sherbert v. Verner, 374 U.S. 398, 405-06 (1963). And again:

> [T]hat a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman v. Updegraff*, 344 U.S. 183 [(1952)]. We there pointed out that whether or not "an abstract right to public employment exists," Congress could not pass a law providing "'. . . that no federal employee shall attend Mass or take any active part in missionary work.'"

Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961), *quoting United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

Speaking for the Court in *Keyishian v. Board of Regents*, Mr. Justice Brennan evaluated the status of the "premise * * * that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." Constitutional doctrine which has since emerged, he said, "has rejected * * * [that] major premise." 385 U.S. 589, 605 (1967).

Mr. Justice Marshall, writing for the Court in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), reaffirmed even more fully the unconstitutional-conditions principle repeated in *Keyishian*. He said:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. * * * "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."

391 U.S. 563, 568 (1968), *quoting Keyishian*, 385 U.S. at 605-06.

As a final indication of the Court's consistent stand against conditioning government employment on waivers or surrenders of constitutional rights of speech or association, Mr. Justice Stewart's summation for the Court in *Perry v. Sindermann* is conclusive:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of

> reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

408 U.S. 593, 597 (1972).

(ii) The principles developed in the foregoing cases cut across all the basic liberties of Americans, both those expressly stated in the Bill of Rights and those, such as the freedoms of political autonomy and association, which lie so deeply imbedded in the foundations of American liberty that life here cannot even be imagined without them. Because political autonomy and free association are the aspects of liberty most seriously and directly threatened by the Board in this case, it seems desirable to bring to the Court's attention at this point the frequency with which those rights have been declared to be of the first order of importance.

By now, freedom of association has been recognized so often as a First-Amendment right that it has even merited an extensive annotation, where all the relevant cases are collected and discussed. Annotation, "The Supreme Court and the First Amendment Right of Association", 33 L. Ed. 2d 865 (1973). As long as sixteen years ago, this Court was saying: "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. *De Jonge v. Oregon*, 299 U.S. 353, 364; *Bates v. Little Rock*, [361 U.S.] at 522-523." *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960). Yet even earlier than that, in

Sweezy v. New Hampshire, the then Chief Justice referred to "past expressions and associations" as exercises of "rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment." 354 U.S. 234, 250 (1957).

Among the most powerful as well as earliest identifications of association as a basic freedom, indeed, is the one quoted in *NAACP v. Button*, 371 U.S. 415, 431 (1963):

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups. . . ." *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (plurality opinion). *Cf. De Jonge v. Oregon*, 299 U.S. 353, 364-366.

In 1952, Mr. Justice Frankfurter referred with natural ease to the "right of association [as] peculiarly characteristic of our people." *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion). Twenty years later, Mr. Justice Powell definitively located freedom of association among the great, basic rights:

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. See, e.g., *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) * * *; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (Harlan, J., for a unanimous Court). There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.

Healy v. James, 408 U.S. 169, 181 (1972).

It seems fair to say that the foregoing expressions, drawn as they are from decisions spanning a whole generation, establish freedom of association and political autonomy as integral features of the architecture of personal freedom blueprinted in the Bill of Rights, even though not expressly mentioned there.[10] Not every feature of any structure is always visible, either on paper or in the sensory order. Its foundation is normally not visible after a building is erected. But the building could not stand without its foundation, however invisible, and the other liberties of Americans would be as precarious as a foundation-less building should political autonomy and its integral mechanism, freedom of association, be pulled out from under them or allowed to decay by neglect. Quite possibly a similar idea induced Chief Justice Burger to

[10] *See* Perry v. Sindermann, 408 U.S. 593 (1972); United Transportation Union v. Michigan Bar, 401 U.S. 576, 578-79 (1971) ("workers have a right under the First Amendment to act collectively to secure good, honest lawyers to assert their claims against railroads"); *In re* Stolar, 401 U.S. 23, 28-30 (1971) ("First Amendment prohibits Ohio from penalizing an applicant by denying him admission to the Bar solely because of his membership in an organization"); United States v. O'Brien, 391 U.S. 367, 385 (1968); United States v. Robel, 389 U.S. 258, 263 (1967) ("the operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment"); Cramp v. Board of Public Instruc., 368 U.S. 278, 282 (1961) (state-action invalidated because it "impinge[d] upon * * * constitutionally protected right of free speech and association"); *see also* Schware v. Board of Bar Examiners, 353 U.S. 232, 250-51 (1957) (Frankfurter, J., concurring).

The early development of free association as a First-Amendment right is covered by C. Rice, *Freedom of Association* (1962), and by Fellman, "Constitutional Rights of Association", in Kurland, ed., *Free Speech and Association: The Supreme Court and the First Amendment* 58-59 (1975). *Cf.* Emerson, "Freedom of Association and Freedom of Expression", 74 *Yale L.J.* 1 (1964).

say, only last term, that "I have long thought freedom of association and freedom of expression were two peas from the same pod." *Buckley v. Valeo*, ____ U.S. ____, ____, 96 S. Ct. 612, 738 (1976) (dissenting in part).

(iii) Although "the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer", *McElroy*, 367 U.S. at 897-98, it does not follow that those governments have no control at all over the qualifications for or conditions of public employment. This Court has not pursued the "unconstitutional-conditions" principle that remorselessly. In one of the earlier cases, for example, Mr. Justice Clark said for the Court:

> To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.

Slochower v. Board of Higher Education, 350 U.S. 551, 555 (1956). And in *Pickering* Mr. Justice Marshall disavowed any intention to strip government-employers of all control over their employees. "The problem in any case", he said, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

Properly harmonizing the contending values must obviously preserve, for government, authority over its employees sufficient to insure proper performance of the legitimate functions that our governments have been created to serve; while at the same time preserving for government-employees to the greatest possible extent the basic liberties that all private citizens possess. *Cf. Healy*, 408 U.S. at 202-03 (Rehnquist, J., concurring).

The proper way to reconcile the needs of government with the constitutional rights of public employees, as suggested

repeatedly by the decisions of this Court, is the strictly neutral, objective, job-related or job-oriented set of rules (usually referred to as the "merit system") which prevails by and large throughout the civil service. *Cf.* O. G. Stahl, *Public Personnel Administration* 29-45, 310-55 (6th ed. 1971); F. C. Mosher, *Democracy and the Public Service* 187, 202 *et seq.* (1968). A similar approach was plainly involved in Justice Black's comment that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

Quite recently, in *Washington v. Davis*, the Court has had occasion to examine carefully one aspect of the civil-service merit system, the so-called "Test 21" utilized by the Washington, D.C., police force in its hiring process. Challenged under the Fourteenth Amendment as racially discriminatory, Test 21 was upheld even though a disproportionate number of black applicants allegedly failed it. In rejecting the challenge to Test 21, this Court relied upon and quoted favorably the trial court's finding to the effect that "the test * * * [was] reasonably and directly related to the requirements of the police recruit training program and * * * [was] neither so designed nor operated to discriminate against otherwise qualified blacks." 44 U.S.L.W. 4789, 4791 (U.S. Jun. 7, 1976), *citing Davis v. Washington*, 348 F. Supp. 15, 17 (D.D.C. 1972).

Similarly, the Court decided last term that so long as the discharge of a public employee (a police officer) was based upon his alleged violation of job-related rules—not on an exercise of rights protected by the First and Fourteenth Amendments—there was no occasion for the federal courts to review the discharge, even though, because summary judgment was granted, the Court was required to assume (as the

plaintiff had alleged) that the discharge was based on mistaken reasons. Speaking for the majority, Mr. Justice Stevens said:

> In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 44 U.S.L.W. 4820, 4823 (U.S. Jun. 10, 1976).

In applying *Washington v. Davis* and *Bishop v. Wood* to this case, the relevant question is whether the Board's compulsory-dues requirement—a requirement with, to say the least, First-Amendment implications—is in any sense "job-performance-related" or bears any rational relationship at all to appellants' functions as school-teachers. *See infra* pp. 128-47. It is difficult indeed to see how there could be a positive correlation between teaching-talent or teaching-performance and paying dues to a union. One may confidently premise, on the basis of the cases that we have been considering, that a set of civil-service rules which set forth, among other requirements, that the teachers belong or pay dues to a private association permeated with political characteristics would be held unconstitutional *per se*—flatly and irrebutably. *Cf. Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).[11] And if such

[11] In an interesting case, practically on all fours with the present one, the Pennsylvania Court of Common Pleas, sitting *en banc*, found a compulsory-dues requirement so incompatible with the purposes of the civil-service tenure laws governing the employment of teachers that it refused to hold the Pennsylvania PERA provision authorizing the agency-shop in public employment applicable to the teachers involved in the case. Pennsylvania Labor Relations Board v. Uniontown Area School Dist., ____ Pa. D.&C.2d ____, 357 A.2d ____ (C.P., Fayette Cty., No. 737, May 20, 1976).

a supposition is sound, there is no reason to believe that the constitutional defect would be cured by placing the invalid condition in a collective agreement rather than in the civil-service rules. *See infra* p. 56.

b. Public employment may not be conditioned on nonmembership in a labor organization.

The Board, the Union, and the Michigan courts have studiously ignored the line of decisions just reviewed. Not so much as a mention of them is to be found even in the case tables of appellees' briefs in the lower courts,[12] despite the fact that they have from the beginning constituted the principal authority upon which the Teachers have relied.[13] The only recognition found in the Michigan Court of Appeals' decision that there is a serious constitutional question in this case was its grudging admission that the agency-shop clause authorized by PERA §10 "could" violate plaintiffs' First- and Fourteenth-Amendment rights (A. 102)—an admission withdrawn almost as soon as it was made, on the basis of cases which, to say the least, as we shall show in Part III., *infra*, by

[12] R., Brief of Defendants-Appellees in Opposition to Plaintiffs-Appellants' Application for Leave to Appeal, Mich. Sup. Ct., Jul. 7, 1975; Brief of Defendants-Appellees, Mich. Cir. Ct., Jul. 19, 1974, at iii-v; Brief of Detroit Federation of Teachers in Support of Motion for Summary Judgment, Mich. Cir. Ct., Dec. 18, 1969, at i-iv.

[13] R., Plaintiffs-Appellants' Brief in Support of Application for Leave to Appeal, Mich. Sup. Ct., Jun. 3, 1975, at 14-30; Appellants' Reply Brief, Mich. Cir. Ct., Jan. 24, 1975, at 3-14; Brief in Support of Claim of Appeal, Mich. Cir. Ct., Apr. 11, 1974, at 15-27, 35-47, 64-70; Memorandum in Opposition to Motion of Defendants for Summary Judgment in Their Behalf, Mich. Cir. Ct., Jul. 13, 1973, at 5; Brief for Plaintiffs on Motion for Summary Judgment, Mich. Cir. Ct., Dec. 18, 1969, at 27-35.

no means support the decision of the Michigan court.

However, while the line of decisions ranging from *Barnette* to *Keyishian*, *Pickering*, and *Sindermann* has been denied even the barest consideration by appellees and the Michigan courts, the inferior federal courts uniformly have found in those cases a mandate to hold that no public employer may condition public employment upon a renunciation of the free association exercised when a public employee chooses voluntarily to affiliate with a labor organization.[14]

The rulings of the inferior federal courts have been ignored by appellees and the Michigan courts as scrupulously as they have ignored the precedents of this Court upon which those rulings were based. This determination neither to see nor to hear nor to say anything about these cases is perhaps understandable. Since they are the precedents most obviously and immediately relevant to a fair and reasoned disposition of the present case, however, the studied refusal of the Michigan courts to admit their mere existence cannot be condoned. Certainly the Teachers do not intend to be confined by the tunnel vision of the Board, the Union, and the Michigan courts, or to emulate them as living versions of the three small simians who hear no evil, see no evil, speak no evil.

Although a considerable number of the inferior federal courts have ruled that public employees may not constitution-

[14] **COURTS OF APPEALS**: American Fed'n of State, County, & Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969); Hanover Township Fed'n of Teachers v. Hanover Community School Corp., 318 F. Supp. 757 (N.D. Ind. 1970), *aff'd*, 457 F.2d 456 (7th Cir. 1972); Lontine v. Van Cleave, 483 F.2d 966 (10th Cir. 1973); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970).

THREE-JUDGE COURTS: Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969); Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969), *appeal dismissed per stipulations*, 400 U.S.

(continued)

ally be discharged or otherwise discriminated against for joining unions, it will be sufficient for present purposes to focus attention upon only the first three decisions in the line, since they are representative of the others and since, moreover, they expose their origins more fully than their successors do.

These three decisions—*Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court), *American Federation of State, County, and Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969), and *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968)—were all handed down in the few months from June 1968 to February 1969. The dates are important. This Court had only recently held in *Pickering* that a public-school teacher could not be discharged for speaking critically of the local board of education even though his speech contained a number of mistakes. Ten years earlier, the Court had declared the right of free association to be a First-Amendment right. *NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958). These two cases, and the others which came between them, were the principal authorities for the Seventh Circuit's decision in *McLaughlin* that the Cook County Board of Education violated the First and Fourteenth Amendments in discharging school-teachers for having joined the American Federation of Teachers. 398 F.2d at 288-89. "Just this month", said Judge Cummings for the Seventh Circuit, "the Supreme Court held [in *Pickering*] that

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(footnote continued from preceding page)

801 (1970); Police Officers' Guild v. Washington, 369 F. Supp. 543 (D.D.C. 1973); Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo.), *aff'd mem.*, 44 U.S.L.W. 3737 (U.S. Jun. 21, 1976).

FEDERAL DISTRICT COURTS: Bateman v. South Carolina State Ports Authority, 298 F. Supp. 999 (D.S.C. 1969); Firefighters, Local 2340 v. Willis, 400 F. Supp. 1097 (N.D. Ill. 1975); Service Employees Int'l Union v. County of Butler, 306 F. Supp. 1080 (W.D. Pa. 1969); Teamsters, Local 594 v. City of West Point, 338 F. Supp. 927 (D. Neb. 1972).

an Illinois teacher was protected by the First Amendment from discharge even though he wrote a partially false letter to a local newspaper in which he criticized the school board's financial policy. * * * If teachers can engage in scathing and partially inaccurate public criticism of their school board, surely they can form and take part in associations to further what they consider to be their well-being." *Id.* at 289.

In January 1969, the *Woodward* case relied on the same line of decisions which the Seventh Circuit had found determinative in *McLaughlin*, citing *Keyishian* and *McLaughlin* itself, in addition to a number of those we have reviewed *supra* p. 23. *See* 406 F.2d at 138-40 & n.5. Speaking for the Eighth Circuit, Judge Heaney said that "[u]nion membership is protected by the right of association under the First and Fourteenth Amendments" and that "[u]nless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment." *Id.* at 139, 140, *quoting McLaughlin*, 398 F.2d at 289.

A month later, in February 1969, a three-judge federal court in North Carolina, in *Atkins v. Charlotte*, joined the Seventh and Eighth Circuits in holding that—for public employees (firemen in this case)—joining a union is an exercise of the First- and Fourteenth-Amendment right of freedom of association. 296 F.Supp. at 1075. It joined the two circuits also in reasoning from such decisions as *Kevishian* and *Pickering* that the State of North Carolina could not prohibit public employees from joining a union. 296 F.Supp. at 1075-77.

As already noted, the federal courts have since 1969 followed *Woodward*, *Atkins*, and *McLaughlin* with perfect unanimity. *Supra* note 14. This state of affairs contrasts sharply with the earlier point of view, shared by state courts from coast to coast, to the effect that joining a union was impermissible to public employees as an intolerable threat to the sovereign powers and duties of the governments which employed them. *E.g.*, *Perez v. Board of Police Commis-*

sioners, 78 Cal. App. 2d 638, 178 P.2d 537 (1947); *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); *Railway Mail Association v. Murphy*, 180 Misc. 868, 875 (N.Y. Sup. Ct. 1943). This change has doubtlessly been brought about by the repeated decisions of this Court that freedom of association is a First-Amendment right, and by the inference that public employees therefore have a constitutional right to make up their own minds, free from any threat of reprisal by their public employers, as to whether or not they should joint unions. *Supra* pp. 23-33.

The unconstitutional-conditions decisions, with their emphasis upon political and associational autonomy, have produced another line of cases in the inferior federal courts which is of some relevance to the present case. We refer here to what have come to be called the "political-patronage" or "spoils-system" cases.[15]

Typically in these cases, upon a change of administration which involves also a change in the party in power, the new administration will either discharge outright those public employees (not protected by civil-service tenure laws) who belong to the losing party or who, when given the option, refuse to change their party affiliation or to support the party newly in power. Once again basing their decisions on this

[15] Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975), *cert. granted*, 423 U.S. 821 (1975); Calo v. Paine, 521 F.2d 411 (2d Cir. 1975), *overruling* Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); Indiana State Employees Ass'n v. Negley, 501 F.2d 1239 (7th Cir. 1974); Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928, 943 (1973); Shakman v. Democratic Organization of Cook County, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971). *Cf.* O'Neill, "Politics, Patronage, and Public Employment", 44 *Cinn. L. Rev.* 725 (1975); Comment, "A Constitutional Analysis of the Spoils System—the Judiciary Visits Patronage Place", 57 *Iowa L. Rev.* 1320 (1972); Comment, "Patronage Dismissals: Constitutional Limits and Political Justifications", 41 *U. Chi. L. Rev.* 297 (1974).

Court's unconstitutional-conditions doctrine, the courts have uniformly been holding patronage dismissals unconstitutional on associational and political-autonomy grounds except in the case of policy-making officials.[16]

We do not contend here that these patronage-dismissal decisions are either necessarily mandated by the unconstitutional-conditions doctrine or indistinguishable from the present case. We believe that tradition must count for something if the country is to achieve a tolerable degree of unity within the diversity that liberty breeds. Patronage dismissals are nothing if not traditional; they have long been understood to be a part of the American political game. More important, however, patronage dismissals (always outside the civil-service system) have a definite working relationship with the system of representative government which in this country we are striving to build. It does the electorate little good to "vote the rascals out" if the "rascals" cannot be made to take their henchmen with them. Again, voting in a reform party would be a bootless effort if the reformers had to rely upon their predecessors' possibly corrupt appointees in order to bring about the reforms on the strength of which they were elected.

No doubt the patronage-dismissal cases if affirmed would constitute additional authority for the Teachers here. Indeed, affirmance of the decisions invalidating patronage dismissals would make an *a fortiori* case for the Teachers. For while there is some positive contribution to the democratic process in a patronage dismissal, no such contribution exists in a dismissal of a faithful civil servant simply because he or she

[16] *But see* American Fed'n of State, County, & Municipal Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971), notable not only for its departure from the general tendency to view patronage dismissals as unconstitutional but also for its mordant reflection that "[t]hose who, figuratively speaking, live by the political sword must be prepared to die by the political sword." *Id.* at 536, 280 A.2d at 378.

has declined to associate with a labor organization. As a matter of fact, whether we like it or not, it still remains an open question whether compulsory public-sector unionism is compatible with representative government at all. *See infra* pp. 62-76, 164-76. But even were it to appear, ultimately, that representative government can survive compulsory unionism substantially as well as formally, it would still constitute an invasion of free association and of political autonomy for any government to compel its employees to join or pay dues to a labor organization as a condition of employment. Rational inference from the decisions of this Court heretofore reviewed and from the decisions of the inferior federal courts reviewed in the present section leads overpoweringly to such a result.

A possible argument against the Teachers is that freedom of association somehow protects only those who choose to associate, not those who choose to *refrain from* associating. We deal with this contention in the succeeding section. One other escape-method is conceivable. It might also be argued that requiring only financial support of a private organization—not formal membership therein—does not infringe associational rights "because only money is involved, not active, physical or ideological association". We deal with this possible technique of avoiding the unconstitutional-conditions doctrine in the next section but one. *Infra* p. 46.

c. By parity of reasoning public employment may not be conditioned upon membership in a labor organization.

Whether a constitutional right *not* to associate with a private, politically oriented organization shall prevail in public employment is the crux of this case. Were this not so, the Court might justly condemn counsel for wasting its time with an effort to prove the existence of what would seem to be a self-evident truth. For, as an original proposition, the concepts "right" and "privilege" would seem necessarily to imply

freedom either to act or to decline to act in respect of the subject in question. Thus: freedom of religion, if meaningful, must comprehend freedom (or "the right") to embrace or to reject any religious creed; free speech, the right to remain silent; freedom of the press, the right not to publish; freedom of petition, the choice to rest easy; political autonomy, the option to be independent of all parties; and freedom of association, the right to remain a loner.

Argument to the contrary produces only paradox. If "right" or "privilege" connoted only the positive aspect, every "right" or "privilege" would be at the same time a "duty" or an "obligation". No legal system could function within such contradictions. As Mr. Justice Sutherland indicated in *Patton v. United States*, it is impermissible "to convert a privilege into an imperative requirement." 281 U.S. 276, 298 (1930). And Justice Frankfurter was expressing the same idea, in a Sixth-Amendment case, when he said that "[w]hat were contrived as protections for the accused should not be turned into fetters" and that to force a lawyer upon an unwilling defendant would be "to imprison a man in his privileges and call it the Constitution." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942). Just last term, in an opinion by Mr. Justice Stewart, the Court reaffirmed its adherence to the conception that in the constitutional context the terms "right", "liberty", and "freedom of choice" are interchangeable:

> [T]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master * * *.

Faretta v. California, 422 U.S. 806, 820 (1975). The dual implication of the term "right" has been noted in cases spanning the First-Amendment liberties:

(i) Religion and Speech:

> The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all * * *.
>
> I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination.

Board of Education v. Barnette, 319 U.S. 624, 645-46 (1943) (Murphy, J., concurring).

> "Neither a state nor the Federal Government * * * can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

Torcaso v. Watkins, 367 U.S. 488, 492-93 (1961), *quoting Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

> Freedom of speech presupposes a willing speaker.

Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., ____ U.S. ____, ____, 96 S. Ct. 1817, 1823 (1976).

(ii) Freedom of the Press

> Dissenting in *Pittsburgh Press* [*v. Pittsburgh Human Relations Comm'n*, 413 U.S. 376, 400 (1973)], Mr. Justice Stewart joined by Mr. Justice Douglas, expressed the view that no "government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." * * *

* * * * *

> Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which " 'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. Grosjean v. American Press Co., 297 U.S. 233, 244-245 (1936).

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 255-56 (1974) (footnote omitted).

> Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Government and Mass Communications 633 (1947).

Id. at 261 (White, J., concurring).

(iii) Political Autonomy:

> Neither the United States nor any State may require any individual to salute or express favorable attitudes toward the flag. West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

Smith v. Goguen, 415 U.S. 566, 589 (1974) (White, J., concurring).

> To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Barnette, 319 U.S. at 634.

If freedom of speech, press, religion, and political action necessarily imply the freedom *not* to speak, *not* to publish, *not* to believe, and *not* to participate in party politics, it is impossible to see how freedom of association, which the Court has repeatedly accorded equivalent status, can be limited to only its positive, active, aspect. Mr. Justice Douglas, though dissenting, was undoubtedly uttering a fixed truth when he said that:

> The right of association is an important incident of First Amendment rights. The right to belong—or not to belong—is deep in the American tradition.

Lathrop v. Donohue, 367 U.S. 820, 881-82 (1961).

Proving that the right of *non*association exists is something like proving that the sun rises in the East and sets in the West. *Of course* it exists and is exercised, day in and day out, year in and year out, by millions of Americans. In fact, the right of nonassociation ranks at the very top of the institutions which distinguish free societies from unfree ones.[17]

Moreover, as regards the right of nonassociation with labor unions, it should be and in the eyes of the law *is* no different from the right of nonassociation with any other voluntary, private, association. This Court has held consistently that the union-membership relationship is contractual—hence voluntary—in character. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 182 (1967); *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958). *See also NLRB v. Boeing Co.*, 412 U.S. 92 (1973); *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *Marlin Rockwell Corp.*, 114 N.L.R.B. 553 (1955); *Union Starch & Refining Co.*, 87 N.L.R.B. 779 (1949).

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[17] *Cf.* Good v. Associated Students, 86 Wash. 2d 94, 100-04, 542 P.2d 762, 766-68 (1975), *citing* C. Rice, *Freedom of Association* xviii, 88 (1962).

Writing for the Court in *Granite State Board*, Mr. Justice Douglas spelled out the nature of the union-membership relationship:

> We have here no problem of construing a union's constitution and bylaws defining or limiting the circumstances under which a member may resign from the union. We have, therefore, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit "subject of course to any financial obligations due and owing" the group with which he was associated.

NLRB v. Granite State Joint Board, 409 U.S. 213, 216 (1972), *quoted with approval in Booster Lodge No. 405, Machinists v. NLRB*, 412 U.S. 84, 88 (1973).

The "financial obligations" referred to at the end of the foregoing quotation undoubtedly meant only those which the renouncing employees had incurred as voluntary members. In any event, *Granite State Board* involved private-sector employees subject to the agency-shop provisions of National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). *Cf. NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). As we have seen, private-sector employers at common law were privileged to condition employment largely at will, limited only by specific statutes or exceptional common-law rules. *Supra* pp. 13-15. In merely *permitting* them to continue to make the kinds of agreements that they were privileged to make at common law, the National Labor Relations Act does not raise the kind of constitutional question that the Board has raised in compelling the Teachers to associate with the Union as a condition of their public employment. *Cf. Linscott v. Millers Falls Co.*, 440 F.2d 14, 19-20 (1st Cir.) (Coffin, J., concurring), *cert. denied*, 404 U.S. 872 (1971). *See supra* pp. 11-17, *and infra* pp. 191-95. The Homes dictum in *McAuliffe* remains as applicable to *private* employers today as it did when he wrote it in 1892. But as we have shown in the

preceding subsections of this brief, all public employers–state, local, and federal–are constrained by the First Amendment to avoid conditioning public employment on waivers or forfeitures of the right of association or nonassociation.

We have before us the question whether the Board, an agency of the State of Michigan, could constitutionally compel the Teachers to associate with the Union. The Teachers did not and do not wish to associate with the Union. They prefer to dissociate themselves from it. If freedom of association is a First-Amendment right, as this Court has held in a multitude of cases, many of them cited herein; if freedom of association comprehends both the right to associate and the right *not to* associate, as the fundamental juridical character of all rights would seem to imply and as this Court has frequently noted; and finally, if it is true, as it most certainly is, that public employment may not under the consistent rulings of this Court be conditioned upon a surrender of any First-Amendment right–then it would seem that the action taken by the Board and the Union against the Teachers in this case is on its face a clear violation of their First-Amendment rights.

Appellees may contend that in compelling the Teachers to pay dues and fees to the Union they did not force them to become formal members and therefore did not violate their freedom of association. This conception of the meaning of free association, as narrow and artificial as it may seem, must nevertheless be considered carefully and candidly. And to that task we now turn.

d. Compulsory financing of a labor organization infringes freedom of association.

The Teachers contend that the Board's requirement that they pay dues and fees to the Union as a condition of employment violates their First- and Fourteenth-Amendment freedoms of speech, association, and political autonomy.

Establishing the validity of this contention calls for demonstration (i) that forcing financial contributions to a private association–especially to a private association of a fundamentally political character, *see infra* pp. 62-76–amounts to essentially the same thing as compelling the Teachers to accept formal membership therein, from the point of view of the First Amendment; and (ii) that this Court has taken a firm stand against any such form of compulsion, identifying financial exactions with the other forms of compulsion denied to the states. It will be necessary also to show (iii) that the Teachers' position is unaffected by this Court's decisions in *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956).

(i) Although in dissent, Justice Black was stating sound constitutional doctrine when he said that:

> [The First] Amendment leaves the Federal Government no power whatever to compel one man to expend his energy, his time or his money to advance the fortunes of candidates he would like to see defeated or to argue ideologies and causes he believes would be hurtful to the country [;]

and revealing an acute grasp of the facts of life when he said:

> "[o]ne who is compelled to contribute the fruits of his labor to support or promote *political or economic* programs or support candidates for public office is just as much deprived of his freedom of speech as if he were compelled to give his vocal support to doctrine he opposes." I fully agree with this holding of the Georgia Supreme Court and would affirm its judgment with certain modifications of the relief granted[;]

and relating sound constitutional doctrine to the facts of life when he said:

> Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government

> of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, *whether economic, scientific, political, religious* or any other.

International Association of Machinists v. Street, 367 U.S. 740, 783-84, 791 (1961) (footnote omitted) (emphasis supplied).

Recognition in the *United States Reports* that financial contributions are tantamount to physical participation in First-Amendment activities has not been limited to dissenting opinions. Contributions were identified with personal, physical, association just last term in *Buckley v. Valeo*:

> The [1975 Campaign Financing] Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee * * *.

___ U.S. ___, 96 S. Ct. 612, 633-34 (1976). Partly in dissent, the Chief Justice identified financial contributions as First-Amendment activity even more emphatically than the majority in *Buckley* had done:

> The Court's attempt to distinguish the communication inherent in political *contributions* from the speech aspects of political *expenditures* simply will not wash. * * * [P]eople—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utter the words.

Id. at ___, 96 S. Ct. at 738-39.[18] There can be no doubt that the Court has been correct in identifying the right to make

[18]Other cases in which financial support of an organization was considered association protected by the First Amendment are, *e.g.*, Shelton v. Tucker, 364 U.S. 479, 487-88 (1960); Bond v. County of Delaware, 368 F. Supp. 618, 625-27 (E.D. Pa. 1973); Pollard v. Roberts, 283 F. Supp. 248, 257-58 (E.D. Ark.) (three-judge court), *aff'd mem.*, 393 U.S. 14 (1968).

(or to refuse to make) financial contributions with the rights to speak (or to remain silent), to associate (or to refuse to associate), and to engage (or to refuse to engage) in political activities. The Teachers' money is, after all, nothing other than their past labors in an exchangeable form, a product of their energy-expenditures, physical and mental. When it is granted to or withheld from any organization, it is the same as granting or withholding the services for which the human energy stored up in the money would be exchanged. Thus to compel the Teachers to pay dues to the Union, as both a logical and a practical matter, is the same as to compel them physically to participate in, as well as to fund, the Union's economic and political activities.

(ii) The Court has not only associated the stored-up energy which we call money with the great First-Amendment rights; it has also held flatly that it is impermissible to construe the First Amendment so narrowly that commercial transactions and especially commercial advertising are arbitrarily excluded. In *Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ___ U.S. ___, ___, 96 S. Ct. 1817, 1826 (1976), the question asked of the Court was whether speech which proposed only a commercial transaction was so removed from any exposition of ideas that it was not entitled to any First Amendment protection. Mr. Justice Blackmun's succinct response for the Court: "Our answer is that it is not." Mr. Justice Blackmun also regarded as "already * * * settled or beyond serious dispute" that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Id.* at 1825.

There is nothing new in the perception that financial exactions rank high among the weapons with which civil rights and civil liberties may be diminished. In his concurring opinion in *Street*, Mr. Justice Douglas recalled that the Founding Fathers long ago had voiced their hostility to even minor exactions imposed by the state for the benefit of private establishments:

> Madison, in his Memorial and Remonstrance Against Religious Assessments, wrote, "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" II Writings of James Madison (Hunt ed. 1901), p. 186.
>
> Jefferson, in his 1779 Bill for Religious Liberty, wrote "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." See 12 Hening's Va. Stat. 85; Brant, Madison, The Nationalist (1948), p. 354.

367 U.S. at 778 n.4.

Surely it would shock those who drafted the Bill of Rights to learn that some of the states have arrogated to themselves the power to make their employees kick back a part of their salaries to private associations deeply enmeshed in political activities. *See infra* pp. 62-80. What we have here is even worse than the "tax on belief and expression" which the Court struck down in *Speiser v. Randall*, 357 U.S. 513, 529 (1958) (Black, J., concurring). The exaction imposed by Michigan on its public-school teachers compels them to finance both economic and political-ideological activities which they profoundly oppose. If Michigan may constitutionally do this to its public servants, where does its power end?

This Court must bear in mind that we are at the threshold of the many and grave constitutional issues so evident in the process of compulsory public-sector bargaining which is beginning to take hold in the states and localities. Loud arguments will be made in justification of the imposition now before the Court. But the time to resist beginnings is at the beginning. *Barnette* was a great decision, and Mr. Justice Jackson's opinion for the Court has proved imperishable equally for its eloquence and its wisdom, precisely because they both were alert to the implications of the issues involved

and courageously determined to hold fast to the strong shield of liberty provided by the First Amendment. Just as the government officials were in *Barnette*, so too will the unions and state agencies in cases such as this be fertile in producing reasons why one after another imposition is useful or serviceable. With each new imposition, the First-Amendment liberties of dissident public employees will be diminished–till, finally, they will be sadly reduced as human beings. Before so repugnant a result is allowed, it would be well to heed Justice Jackson's warning against permitting rationalizations of utility to wear away the protections of the First Amendment:

> Whether the First Amendment * * * will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any particular creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Barnette, 319 U.S. at 634 (footnote omitted).

(iii) While appellees and the court below relied in a vague kind of way on *Hanson* in refusing to invalidate the agency-shop outright, it seems desirable in the interests of a thoroughly informed disposition of this case to deal also with *Lathrop v. Donohue*, 367 U.S. 820 (1961). *Hanson* plays so curious a rôle in the arguments and decision below that we have decided to consider it separately and at length in Part III., *infra* p. 187, in order to avoid fragmenting the analysis among the various parts of this brief to which it is relevant.

Because of its relevance uniquely to the point we are presently considering, however, *Lathrop* should be dealt with here.

Summed up, the Teachers' contention concerning *Lathrop* is two-fold: (A) that it stopped considerably short of deciding the fundamental constitutional issue here raised; (B) that, though clearly distinguishable, to the extent that it is relevant here *Lathrop* strengthens the Teachers' position that they may not be forced to finance organized economic, ideological, and political activities to which they are opposed.

(A) Reduced to its essentials, *Lathrop* affirmed a decision of the Wisconsin Supreme Court upholding its own authority to create an "integrated" state bar and to require every attorney in the state to pay annual dues to it. By admission of Justice Brennan, who wrote the plurality opinion; according to the heated objection of Justice Black, who dissented; and in the express view of Justice Harlan, who concurred specially—*Lathrop* decided nothing else. In short, because no majority was available which could agree both that the case was ripe for decision *and* on the ultimate First- and Fourteenth-Amendment issues, those issues, to the undoubted relief of some members of the Court and the exasperation of others, were completely avoided.

So clear is this fact that is appears starkly in headnote 3 of the decision:

> 3. The judgment is affirmed without passing on the conclusion of the Wisconsin Supreme Court that appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes. Pp. 843-848.

That this headnote faithfully reflected the views of the Court's plurality is evident in these statements by Mr. Justice Brennan, who wrote their opinion:

> We are persuaded that on this record we have no sound basis for deciding appellant's constitutional claim insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes. Even if the demurrer is taken as admitting all the factual allegations of the complaint, even if these allegations are construed most expansively, and even if, like the Wisconsin Supreme Court, we take judicial notice of the political activities of the State Bar, still we think that the issue of impingement upon rights of free speech through the use of exacted dues is no more concretely presented for adjudication than it was in *Hanson*. * * *

* * * * *

> We, therefore, intimate no view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes. That issue is reserved, just as it was in *Hanson* * * *. Upon this understanding we four vote to affirm. Since three of our colleagues are of the view that the claim which we do not decide is properly here and has no merit, and on that ground vote to affirm, the judgment of the Wisconsin Supreme Court is *Affirmed.*

367 U.S. at 845, 847-48.

With customary vigor, Mr. Justice Black (dissenting) emphasized both the paradox that the peculiar line-up in the Court produced and the failure to decide anything which heightened the paradox:

> [T]he only proposition in this case for which there is a majority is that the constitutional question is properly here, and the five members of the Court who make up that majority express their views on this constitutional question. Yet a minority of four refuses to pass on the question and it is therefore left completely up in the air—the Court decides nothing.

Id. at 866. Mr. Justice Harlan, who wished to affirm the Wisconsin Supreme Court's constitutional holding but could not command a majority for that purpose, also lamented the plurality's decision to avoid the constitutional question, which, he said, "should [not] be left in such disquieting * * * uncertainty." *Id.* at 848.

So far as the present case is concerned, then, the only possible conclusion is that *Lathrop* provides little or no guidance. The peculiar split of opinion permitted a minority of four Justices to override the desire of five others to confront the constitutional issue; and the result was that *Lathrop* made no contribution to constitutional law at all. The appeal might as well have been denied altogether. But if this Court is to make a practice of evading grave constitutional questions, as was done in *Lathrop*, the injury to the commitment to create a community enjoying liberty under law will far outweigh the benefits, frequently dubious, of postponing decision on pressing constitutional issues.

In a cosmic sense it may be unfair to burden mortal men with the heavy responsibilities that this Court is so often called upon to bear. Such a thought must have occurred more than once to its Members, as it doubtless has to all mature observers of the finality of the Court's decisions. Yet there is little to be done about it, if the Court is to serve its high purposes and ends. Mr. Justice Jackson said about all there is to be said on the subject in *Barnette*:

> [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

319 U.S. at 640.

The issues in this case are over-ripe for decision. If the record as it exists does not satisfy the Court, the fault lies with appellees and the courts below, not with the Teachers. *See supra* pp. 18-20. If the Court is not willing to reverse the court below, purely and simply, then it should reverse and remand.

(B) There is no way in which *Lathrop* can properly be considered as a decision favoring the Board and the Union against the Teachers. Besides avoiding the constitutional question which the Teachers have raised, the decision in *Lathrop*, as far as it went, rested fundamentally on the fact that lawyers and their associations have always occupied a peculiar, *quasi*-governmental, rôle, one which made compulsory membership in the *state-created* integrated bar no more a violation of First-Amendment liberties than could be held to exist in virtue of the fact that taxes are compulsory; or that special assessments may be levied against those who benefit particularly and uniquely from certain public works; or that fees may be charged for certain licenses issued by the state. *Cf.* Justice Whittaker's concurring opinion in *Lathrop*, 367 U.S. at 865.

This Court and its Members, variously, have often noted the peculiar public character which lawyers acquire as court-officers. *E.g.*, *Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* ___ U.S. ___, ___, 96 S. Ct. 1817, 1831-32 (1976) (Burger, C. J., concurring); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 156-58, 170-73 (1971); *Spevack v. Klein*, 385 U.S. 511, 524 (1967) (Harlan, J., dissenting); *NAACP v. Button*, 371 U.S. 415, 455-56 (1963) (Harlan, J., dissenting); *Lathrop v. Donohue*, 367 U.S. 820, 849-50 (1961) (Harlan, J., concurring); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring).

The Union involved in this case, like all labor unions, and business enterprises, is a private, voluntary, strictly self-interested association. The integrated bar involved in *Lathrop*, to repeat, was a state-created agency designed among other things to prepare and propose legislation presumably designed to serve the common good. By no stretch of the imagination can it be concluded that the conception of the common good embraced by the Union in this case extends beyond the economic interests of its members. The economic,

political, and ideological activities of the Union, like those of any other private association, are self-serving. This is not intended as a condemnation of the Union. It is a statement of fact—of fact so clearly established and so widely known that the Court should not hesitate to take judicial notice of it, and in doing so, to recognize the distinction it works between this case and *Lathrop*. *Cf. infra* pp. 103-15.

To compel the Teachers to finance the activities of the Union is to compel them to support activities antagonistic to the interests of taxpayers and of the public agencies which employ the Union's members. *See infra* pp. 62-80, 147-86. It is a commonplace of the law and practice of labor relations that unions and employers are antagonists in the collective-bargaining relationship. *Cf. NLRB v. Insurance Agents International Union*, 361 U.S. 477 (1960). While not nearly so widely recognized, it is nevertheless just as true that private-sector collective bargaining resolves itself ultimately into a conflict between the union and the *customers* of the employer; and that, as Justice (then Judge) Holmes said, the employer is really only the consumers' mandatary when he resists union demands. *Plant v. Woods*, 176 Mass. 492, 505 (1902) (dissenting opinion). In the same way, in public-sector bargaining, the ultimate conflict is between the union and the general public, particularly the taxpayers. To view public-sector unions as public-serving agencies, in the sense in which the *Lathrop* Court viewed the integrated bar, would be a gross mistake. *Lathrop*, therefore, can in no sense be considered authority against the Teachers, either in principle or on the facts.

e. Michigan may not do indirectly what it could not constitutionally do directly.

We have already shown, we believe, that the Michigan Legislature could not compatibly with the First and Fourteenth Amendments directly compel all the public employees of the state to join or financially support unions as a condition of employment. We argue here, in a word, that what the Michigan Legislature could not constitutionally do directly, it should not be able to do indirectly by creating in pro-union public employees, public-sector unions, and agencies of the state acting as employers, powers which the First and Fourteenth Amendments deny to all government.

We start with the fact that nowhere in the Michigan PERA, Mich. Stat. Ann. §17.455(1) *et seq.* (1975 rev.), can one find a provision expressly requiring all employees to join or to pay dues to unions as a condition of employment by the state or by any of its subdivisions. What we find, instead, are provisions: (1) authorizing state-certification of unions as exclusive-bargaining representatives when they have been designated as such by a majority of employees in an appropriate bargaining unit, §17.455(11-14); (2) commanding all public employers to bargain collectively with the exclusive-bargaining representative in appropriate bargaining units, §17.455(15); (3) permitting public employers to make agreements with exclusive-bargaining representatives requiring "as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative", §17.455(10)(1); and (4) declaring, in the name of "stability and effectiveness of public-sector labor relations", a state policy in favor of compelling dissident employees to "share fairly in the financial support of their exclusive bargaining representative", §17.455(10)(2).

Summed up, the statutory scheme amounts to this: If a majority of the employees in an appropriate bargaining unit votes in favor of union representation, that union is authorized to demand and the public employer to require that *all* employees in the unit, including those who do not wish to do so, provide financial support to the union. As we shall see in

the next section of this brief, this is the same as saying that dissident employees must provide financial support for the essentially political activities which constitute the sum and substance of public-sector collective bargaining, as well as for such other political and ideological activities as the union, like any other private association, is privileged to pursue. This is what the Board and the Union have imposed on the Teachers in this case. It is what the Teachers object to most strenuously as a flagrant violation of their First-Amendment rights.

The Union succeeded in distorting the issues in the court below—and presumably succeeded at the same time in confusing the court below—by contending that *the Teachers* were seeking to restrain the constitutional rights *of the Union and its voluntary members!* In order to avoid straining this Court's credulity, we herewith present the following text from appellee Union's brief before the Michigan Court of Appeals:

> We mean only to suggest that when plaintiffs [Teachers], whose right to speak in protest has in no way been stifled or limited [*sic*], say that the majority of their brothers may not speak for risk of offending plaintiffs (or some of them), plaintiffs seek to trade off the constitutional rights of many for the expression—not inhibited [*sic*]—of a few. *That* would present constitutional infirmities of the gravest order.

(R., Brief of Defendants-Appellees, Mich. Ct. App., Jul. 19, 1974, at 32.)

Let there be no doubt here of the real state of affairs; it is the exact opposite of the foregoing account. The Teachers have not in any way sought to dictate to or to exact money from the Union and its voluntary members. It is the other way around. The Union and its voluntary members have sought to compel the Teachers to support the economic, political, and ideological objectives of the Union—and by exactly so much to diminish the energies and the resources properly belonging to the Teachers to advance their own interests and causes. The fact is that the Teachers here stand in the same

position as the dissident appellees in *Barnette*. Like them, the Teachers want neither to push anyone else around nor to be pushed around themselves:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

319 U.S. at 630-31.

While factually distinct, this case is very close to *Barnette* in constitutional principle. Both cases involve an intricate web of state compulsions and restraints. While deviously woven, those compulsions and restraints produce results incompatible with the First and Fourteenth Amendments. We have already shown that this is a true and pure state-action case. Behind the complex procedures for establishing the special privilege of exclusive representation, a privilege unknown to the common law, *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), and forbidden at common law especially to public-sector unions, *e.g.*, *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); *Railway Mail Association v. Murphy*, 180 Misc. 868, 875 (N.Y. Sup. Ct. 1943), the power of the State of Michigan as expressed in the PERA stands as the unique and exclusive source of both the Union's privilege to demand the agency-shop and the Board's power—its *unconstitutional* power, we contend—to grant it.

The teaching of all the state-action cases which the Court has handed down over the last generation, and more, is that no state may do indirectly by a grant of special privilege to a private group or of authority to an administrative agency that which the Constitution prohibits to direct legislative action. *Cf. Evans v. Newton*, 382 U.S. 296, 299 (1966); *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring). Thus in *Smith v. Allwright* this Court held that the right to vote without discrimination cannot be "nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." 321 U.S. 649, 664 (1944). And in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, Mr. Justice Brandeis said for this Court that: "The federal guaranty of due process extends to state action through its legislative, executive, or administrative branch of government." 281 U.S. 673, 680 (1930). Literally dozens of other decisions to the same effect might be cited if the proposition were at all dubious. *See* the state-action cases cited *supra* note 3, and *supra* pp. 13-15. The still powerful, viable, and sternly constitutional decision of this Court in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), is especially relevant here for its uncompromising insistence that government may not delegate to majorities of private groups, power over minorities which the government itself could not exercise. The statute which it struck down, the Bituminous Coal Conservation Act of 1935, the Court said, conferred upon the majority of coal producers and miners

> in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business * * *. The delegation is so clearly arbitrary, and

> so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

Id. at 311.

It cannot be that the Michigan Legislature is competent to transmute a patently unconstitutional abridgment of the Teachers' speech, political, and associational rights into permissible regulation by delegating to employee-majorities, public-sector unions, and state administrative agencies discretionary, arbitrary, authority which the state itself does not possess. State-action is no less unconstitutional merely because it is deviously fragmented and shifts swiftly from locus to locus. If the cases we have just cited and quoted from mean anything, they mean that this Court will not allow the Bill of Rights to be fleeced by what amounts to a legislative shell game.

We have Mr. Justice Marshall's word, written very recently for the Court, that pro-union employees are entitled to no preferential position under the Fourteenth Amendment. *City of Charlotte v. Local 660, Firefighters*, 44 U.S.L.W. 4801, 4802 (U.S. Jun. 7, 1976). This reassurance is nothing more than is to be expected from a Court which could produce the magisterial stand against invasions by majorities of the constitutional rights of minorities expressed in *Barnette*, 319 U.S. at 638:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

We have but one thing to add here. If duly constituted majorities of the electorate are not constitutionally authorized

to deal as they please with the Bill of Rights, it is impossible to see how a majority of employees in an appropriate bargaining unit, a public-sector union, and a public agency such as the Board can be collectively authorized to abridge the speech, associational, and political rights of the Teachers whenever they all get together and decide that it is their common will to do so.

3.

Since public-sector collective bargaining is inherently and unalterably political in character, and since the court below found that the Michigan PERA authorizes the Union to finance political activities with funds exacted from the Teachers, compelling the unwilling Teachers to pay dues and fees to the Union constitutes an a fortiori ***abridgment of their First-Amendment rights.***

We argue here: (a) that as all government programs and expenditures take shape in a political matrix, public-sector bargaining, which has no purpose other than to influence the formulation and administration of such programs and expenditures, of necessity must itself become a part of the political matrix and is thus essentially political in character; (b) that requiring the Teachers to provide financial support to the union's activities compelled them, in violation of their constitutional rights, to contribute to a political process and to partisan political activity to which they were and are opposed; for (c) the Teachers have every right, both as educators and as citizens, to preserve unimpaired their professional, associational, and political autonomy.

a. Public-sector collective bargaining is an inherently political activity.

That all governmental programs and all phases of public administration are politically shaped may be a truism, but it acquires extreme significance when public-sector collective bargaining is examined against it. For if politics determine all governmental programs and all public administration, and if public-sector collective bargaining plays an integral part in this process, then it too acquires an inherently and ineradicably political character. And if public-sector bargaining is essentially a political activity, compelling the unwilling Teachers to finance it is a direct and substantial abridgment of their rights under the First and Fourteenth Amendments.

We emphasize that this conclusion does not rest solely on the assumption that public-sector unions generally – and the appellee Union involved in this case particularly – engage also in such partisan political activities as supporting and making political contributions to candidates for political office, providing testimonial dinners, and "get-out-the-vote" drives – the "nuts and bolts" of practical politics, as Mr. Alexander Barkan, Director of the AFL–CIO's Committee on Political Education once referred to them.[19] Even if the Union's partisan activities were to be eliminated, which of course is not very likely, public-sector bargaining would remain an inherently political phenomenon. The invasion of the Teachers' rights, therefore, is only heightened by, it does not begin with or inhere exclusively in, the Union's partisan activities.

This case is here on what amounts to a demurrer, so that the Teachers' well-pleaded allegations must be taken as fact. *See Bielski v. Wolverine Insurance Co.*, 379 Mich. 280, 283, 150 N.W.2d 788, 789 (1967); *Schuh v. Schuh*, 368 Mich. 568, 572, 118 N.W.2d 694, 696 (1962). The Teachers alleged that, in

[19] "Political Activities of Labor", 1 *Issues in Industrial Society* 23 (1969).

addition to the constitutional infirmities in permitting the Union to expend agency-shop fees on non-collective-bargaining matters, the mere requirement of financial support of its collective-bargaining activities is itself an abridgment of their First- and Fourteenth-Amendment freedoms (A. 13, 49-50). They further alleged "that collective bargaining in public employment in Michigan has disadvantages which outweigh its advantages to individuals embraced within the bargaining unit, and to the public at large, particularly with reference to teachers and to Plaintiffs" (A. 12, 49). From the beginning the Teachers have contended that even in bargaining the Union is engaged in essentially political activities. *See, e.g.*, R., Brief for Plaintiffs on Motion for Summary Judgment at 16-17 (Mich. Cir. Ct., Dec. 18, 1969); Brief in Support of Claim of Appeal at 51 & n.25 (Mich. Ct. App., Apr. 11, 1974). And, as we shall see, the Michigan Supreme Court has agreed as a matter of law that public-sector collective bargaining is inherently political. *See infra* p. 66.

Thus in a technical sense the Teachers' case is complete, and the absence of a full evidential record, while unfortunate, is not fatal. Still, since the Court has never before had occasion fully and directly to evaluate the relationship between public-sector collective bargaining and the Bill of Rights, it seems desirable to present here, as comprehensively and fairly as a reasonable respect for time- and space-limitations permits, the consensus of trained observers and commentators, as well as of participants, concerning the nature of collective bargaining in the public sector. In view of the general availability of the facts, opinions, and comments which we are about to present, there would seem to be no impropriety in the Court's taking judicial notice of them.

We emphasize at the outset that there *is* a consensus. A thorough search of the literature has turned up a wide variety of views on the pros and cons of public-sector bargaining and on the extent to which it should be encouraged or allowed.

But we have not found a single commentator on the subject who has expressed any doubt of the essentially political nature of collective bargaining in the public sector.

We list in the footnote a representative number of the writers, all competent students of the field;[20] and we quote here verbatim and as fully as we dare the relevant comments of other competent authorities. One more prefatory remark needs to be made. So far as their published writings disclose, none of the writers here quoted has expressed any hostility to public-sector collective bargaining. On the contrary, in the same works from which we quote they have all indicated that they believe it to be, under one or another kind of restriction, generally desirable.

This Court has itself recently had occasion to comment upon the political implications of public-sector bargaining and strikes. *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 44 U.S.L.W. 4864, 4868 (U.S. Jun. 17, 1976). However, the most appropriate beginning for our survey of opinion on the political character of public-sector bargaining is the decision of the Michigan Supreme Court in

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[20] D. Bok & J. Dunlop, *Labor and the American Community* 331-338, 340 (1970); M. E. Dimock & G. O. Dimock, *Public Administration* 256 *et seq.* (4th ed. 1969); K. Hanslowe, *The Emerging Law of Labor Relations in Public Employment* 115-17 (1967); R. Horton, *Municipal Labor Relations in New York City: Lessons of the Lindsay-Wagner Years* 123 (1973); F.C. Mosher, *Democracy and the Public Service* 188 (1968) (public-sector bargaining "more nearly resembles standard interest-group tactics"); M.H. Moskow, J.J. Loewenberg & E.C. Koziara, *Collective Bargaining in Public Employment* 252-77 (1970); S.D. Spero & J.M. Capozzola, *The Urban Community and Its Unionized Bureaucracies: Pressure Politics in Local Government Labor Relations* 73 *et seq.* (1973) ("municipal collective bargaining quickly becomes a political contest"); O. G. Stahl, *Public Personnel Administration* 271 *et seq.* (6th ed. 1971); D.T. Stanley, *Managing Local Government Under Union Pressure* 18, 88, 136-152 (1972); J. Steiber, *Public Employee Unionism* 193 *et seq.* and *passim* (1973); K.O. Warner & M.L. Hennessy, *Public Management at the Bargaining Table* 318 *et seq.* (1967); J. Weitzman, *The Scope of Bargaining in Public Employment* 3, 7 (1975); H. Wellington & R. Winter, *The Unions and the Cities* 24-32 (1971).

Fire Fighters, Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975). While the court split two-two on the question whether the Michigan law requiring compulsory arbitration of police- and fire-department labor disputes was an unconstitutional delegation of legislative power, three of the four justices expressly recognized the inherently political character of public-sector collective bargaining. In an opinion in which Chief Justice Kavanagh joined, Justice Levin said that:

> The arbitrator/chairman of the panel is entrusted with the authority to decide major questions of public policy concerning the conditions of public employment, the levels and standards of public services and the allocation of public revenues. Those questions are legislative and political * * *.

394 Mich. at 241, 231 N.W.2d at 228; for Justice Levin's elaborations of the point, *see* 394 Mich. at 249-51, 256-57, 262-67, 231 N.W.2d at 232, 235, 238-40. Justice Williams spoke even more unambiguously:

> [I]t is impossible to separate public-sector collective bargaining from other aspects of the political process.

394 Mich. at 293, 231 N.W.2d at 253.

Mr. Raymond D. Horton, in a careful study of the labor relations of New York City, has reached the same conclusion:

> [M]unicipal labor relations is an inherently political process. The allocation of public money and the fixing of public and managerial policies, two major functions of the labor relations process, are central political acts in any organized society.

Municipal Labor Relations in New York City: Lessons of the Lindsey-Wagner Years 123 (1973).

In a seminal article on public-sector bargaining, Professor George H. Hildebrand was one of the first to bring out the intricate interplay of political forces that public-sector bargaining was bound to produce:

> In the private sector the profit motive imposes its own discipline and accordingly supplies a strong incentive for unity, control, and centralized decision making by management's negotiating team. By contrast, within local government managerial authority is much less inherently likely to be cohesive. The reason is that it involves a multistage structure composed both of appointed executives and elected officials, with the latter in ultimate command. Political interests can assert themselves, and these can be divisive as easily as they can be unifying. The top officials are naturally sensitive to the wishes of the electorate, which includes voters in their capacities as taxpayers, members of unions, and users of public services. In comparison, those who control an agency – say, a sanitation department or a transit authority – are likely to be concerned with costs, efficiency, standards of service, and the power to manage.
>
> Thus there exists an uneasy and potentially unstable relationship between the managers immediately "in charge" and the elected officials to whom they are responsible and upon whom they depend for their budgets and their jobs. The reason for this instability is that the situation is fraught with "politics," in the nonpejorative sense of the word.
>
> On the one side, the managers normally have a professional interest in operating their agencies effectively and in protecting this function as best they can at the bargaining table, in much the same way as executives do in the private sector. In pursuit of this objective, they are acting on behalf of the interests of two important groups: the users of the service and the taxpayers who pay for it. On the other side, the function of the union is to promote and protect the interests of the employees, who constitute a legitimate "third estate" in this competition of aims. At the same time, however, the managers must depend upon the support of the elected officials in the pursuit of their professional interest.
>
> On the other side, the elected officials *may* also share this managerial interest. But unlike the directors of a private corporation, they also have a second and quite separate interest: to stay in office. And they do that by maintaining a majority coalition among the electorate.

> The decisive factor for them is the desires, expectations, and loyalties of that coalition. In other words, and still in the positive rather than the normative sense, it may pay to play pro-union politics or it may not, depending upon the composition and attitudes of the voting constituency. If it does not, the officials can back their managers to the hilt in negotiations, and a unity of interest can prevail that parallels the usual private-sector bargaining case. But if it pays to take the pro-union route, then the mayor and his council may well find themselves in the unhappy dilemma of dual allegiance – to their subordinate executives and to their voting constituents. Furthermore, an ably led union of public employees will be fully aware of this conflict of interest and naturally will be tempted to exploit it to its own advantage: it may make extreme demands in bargaining in order to create a crisis; and it may also seek to bypass the managers in hopes of getting a back-door deal directly with city hall.

"The Public Sector", in Dunlop & Chamberlain, eds., *Frontiers of Collective Bargaining* 131-32 (1967) (footnote omitted).

Professor Clyde W. Summers, a long-standing authority in the law of labor relations, has echoed Professor Hildebrand's opinion:

> The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer. The employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom those officials are answerable are citizens and voters. We have developed a whole structure of constitutional and statutory principles, and a whole culture of political practices and attitudes as to how government is to be conducted, what powers public officials are to exercise, and how they are to be made answerable for their actions. Collective bargaining by public employers must fit within the governmental structure and must function consistently with our governmental processes; the problems of the public employer accommodating its collective bargaining

> function to government structures and processes is what makes public sector bargaining unique.

"Public Sector Bargaining: Problems of Governmental Decisionmaking", 44 *Cinn. L. Rev.* 669, 670 (1975).

Professor John T. Dunlop, formerly Secretary of Labor, has remarked the far-reaching political influences of public-sector bargaining and strikes:

> Strikes among some government employees at times have been directed less against the immediate government employing agency than toward securing for the agency appropriations or grants from the politically responsible executive or legislative body – that is, funds that are outside the resources of the agency. The strikes in New York City of teachers and of transport workers involved this factor, compelling the mayor and the governor to develop resources to meet the requirements of an acceptable settlement. The timing of budget making and collective negotiations in government employment is central to settlement of disputes; indeed, the failure of such coordination has been a major factor in some strikes of government employees. "It is a fundamental principle in government employment that collective negotiations and the resort to procedures to resolve an impasse be appropriately related to the legislative and budget making process."

"The Function of the Strike", in Dunlop & Chamberlain, eds., *Frontiers of Collective Bargaining* 109 (1967) (footnote omitted).

Mr. R. Theodore Clark, Jr., has not only noted the generally political character of public-sector bargaining but documented it with examples of the ways in which public-sector unions back up their bargaining demands with direct political action:

> While there are many similarities in the collective bargaining process in the private sector and the public sector, there is one major and fundamental difference. Unlike the private sector, where collective bargaining takes place in an environment in which market forces

largely predominate, collective bargaining in the public sector must take place in a political environment. Despite this obvious fact, too little attention has been paid to the political aspects of public sector collective bargaining and the potential problems and distortions of the political process that will result if remedies are not instituted.

* * * * *

In order to appreciate the dimensions of the problem, it is necessary to set forth some representative examples of what is currently occurring in public sector collective bargaining.

Item. Mayor Moon Landrieu of New Orleans, Louisiana, testified before the Louisiana Legislature against a compulsory police and fire arbitration bill and was subsequently placed on the state AFL-CIO's blacklist. As a result, labor leaders boycotted meetings at which Mayor Landrieu was in attendance, including meetings with federal officials to discuss various federal programs.

Item. Mayor Wes Uhlman of Seattle, Washington opposed certain demands being made by municipal unions in Seattle and as a result these unions threatened political action against him. As Mayor Uhlman recently stated: "I have been faced with a threat of recall not once, but twice during the past year, both times for management decisions which I made, and which my appointed department heads attempted to implement." While Mayor Uhlman won the recall election by a nearly 2 to 1 margin, the critical fact is that the municipal unions were able to force a recall election. This tactic, the recall petition, "is perhaps the ultimate weapon for a public employee organization or any organized group. By judicious use of the recall petition, organizations can retaliate against officials who defy the organizations' mandates even when there is no election in sight."

Item. A police union in a Chicago suburb succeeded in electing several trustees to the village board of trustees and thereafter advised the village that if the village did not resolve a pending grievance in accordance with the union's wishes, it would pursue the "political route" regardless of the merits of the grievance.

Item. A candidate endorsed and wholeheartedly supported by a local teachers association in Illinois won election to the board of education and thereafter participated in executive sessions at which time the board's strategy and position on collective bargaining matters were discussed. Thereafter, the board member relayed to the teacher association's bargaining team the board's strategy.

Item. The fire fighters union in Syracuse, New York failed to negotiate a 40-hour week with city officials. Thereafter, the union succeeded in getting the state legislature to enact legislation establishing a 40-hour work-week. Thus, public employee groups are able from time to time to engage in "end-run bargaining" at the state level where the organizations are unable to achieve their goals at the local level.

Item. The mayor of Sacramento, California supported a city council resolution asking the governor to utilize state forestry fire fighting personnel during a strike by Sacramento fire fighters. As a result, he was censured by the Los Angeles County Federation of Labor. The motion of censure, in relevant part, stated:

This resolution was given searching consideration by our executive board, particularly as to the question of responsibility held by a representative of the labor movement elected to public office and what the labor movement has the right to expect from office holders put into their position through its efforts.

I don't suppose anybody can say that a labor endorsed candidate – even one who earns his living directly within the labor movement [the mayor is the editor of the Sacramento Valley Union Labor Bulletin] – should be expected to act as a rubber stamp, mindlessly acceding to every demand placed upon him. However, it must be held that any responsible liberal – particularly one with ties to labor and especially one whose bread comes directly from labor – can never be wholly indifferent to the obligations inherent in his relationship to organized labor.

This means, as we see it, that a person in your position . . . should not arrogate to himself a stance of being above the battle. It is our feeling that his view of

> the public good must at all times encompass the whole public good, including the welfare of the working people who are part of his constituency.

"Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem", 44 *Cinn. L. Rev.* 680, 682-83 (1975) (footnotes omitted). A virtually unlimited additional amount of similar comment could be culled from the learned journals, and we cite to some other articles in the footnote.[21] We feel it more useful at this point, however, to refer to the (similar) opinion of practitioners in public-sector labor relations. Thus in a recent speech to the Industrial Relations Research Association, Mr. Donald H. Wollett, head of the New York State Employee Relations Department, spent most of his time emphasizing the permeatingly political environment of public-sector bargaining. *See* Bureau of National Affairs, *Government Employee Relations Report*

[21] Blair, "Union Security Agreements in Public Employment", 60 *Corn. L. Rev.* 183, 194-96 (1975); Burton & Krider, "The Role and Consequences of Strikes by Public Employees", 79 *Yale L.J.* 418, 428-32 (1970); Fellman, "Constitutional Rights of Association", in Kurland, ed., *Free Speech and Association: The Supreme Court and the First Amendment* 65-67 (1975) (gathering the authorities on the impermissibility of public-sector bargaining as an interference with normal political processes); Fleming, "Collective Bargaining Revisited", in Dunlop & Chamberlain, eds., *Frontiers of Collective Bargaining* 13 (1967); Klaus, "The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History", 67 *Mich. L. Rev.* 1033, 1065-66 (1969); Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 *Ind. Rel.* 18, 19-20 (1972); Siegal & Kainen, "Political Forces in Public Sector Collective Bargaining", 21 *Catholic L. Rev.* 581, 583, 585 (1972); Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156 (1974); Wellington & Winter, "Structuring Collective Bargaining in Public Employment", 79 *Yale L.J.* 805, 808, 847-52 (1970); Project, "Collective Bargaining and Politics in Public Employment", 19 *U.C.L.A. L. Rev.* 887 (1972).

(hereinafter "*GERR*") No. 659, at B6-9 (May 31, 1976). Likewise, Mr. Sam Zagoria, a labor relations specialist for many years, speaking to the Society of Federal Labor Relations Professionals, similarly studded his talk with references to the prevailingly political character of public-sector bargaining. *GERR* No. 631, at A2 (Nov. 10, 1975).

If we resort to the statements of public-sector union leaders, we find the same emphasis upon the fundamentally political character of, not only their activities, but also their conception of their proper rôle. Mr. Jerry Wurf, president of the American Federation of State, County, and Municipal Employees (AFSCME), typically speaks of public-sector collective bargaining as a "power relationship where public officials and policy makers respect you as equals and deal with you." Bureau of National Affairs, *Daily Labor Report*, Current Development Section (Jul. 5, 1973). And Mr. Wurf's "State of the Union" address to AFSCME delegates at the union's twentieth international convention was fully as permeated with political programs and political purposes as was the state of the union address of the President of the United States that year. *GERR* No. 559, at G1 (Jun. 17, 1974).

In a speech to the National Press Club, Mr. Terry Herndon, Executive Director of the National Education Association, made it clear that his union seeks a political voice equal to that of the electorate in determining the destiny – not merely of the public-school system – but of the whole of American society, in all the ways in which the NEA "perceives" as related to its political role and duty. We quote Mr. Herndon as reported in *GERR* No. 627, at B20 (Oct. 13, 1975) (emphasis supplied):

> [We] perceive a right to broad scope collective bargaining. It is here that we can effect the policies and describe [*sic*] our professional security, degrees of freedom, support systems, administrative constraints, and economic well-being. *We seek partnership with the public in determining these matters.*

> We perceive the absolute need and responsibility to exert maximum influence on the political system. It is here that the seeds of legislated reform are planted. Through legislation we seek adequate financial support, equitably distributed and fairly collected. We seek meaningful jurisdiction over licensing of teachers [s]o that historical wrongs in preservice and inservice education for teachers as well as research programs can be righted.
>
> Finally, we perceive a need for a supportive political environment for an important and difficult work. This means an inspired and hopeful people which in turn means a courageous, creative, and honest leader – a President who understands the relationship between schools, money, politics, and nation building.
>
> This agenda has attracted more than 1.7 million teachers. We are committed to its fulfillment.

Only a due respect for the requirement that argument be reasonably limited induces the Teachers to refrain from describing at length the rôle that public-sector bargaining has played in creating the current state of crisis which prevails in New York City (and other municipalities where public-sector bargaining has prevailed). *Cf.* R. Horton, *Municipal Labor Relations in New York City: Lessons of the Lindsay-Wagner Years* (1972). It will not be out of place to note in passing, however, that the political crisis brought about in New York City – in part, at least, by public-sector bargaining – has become a national political issue as well. *See The New York Times*, p. 42, cols. 7-8, Jun. 17, 1976, where it is reported, among other things, that Mayor Abraham Beame has assured federal officials that New York's municipal authorities would do what they could to keep the City's labor costs (all set in collective-bargaining contracts) from getting any further out of hand. *See also The Wall Street Journal*, p. 21, col. 2, Jun. 21, 1976.

The inherently political nature of public-sector collective bargaining is implicitly recognized in two recent decisions of this Court. In the first, *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 44 U.S.L.W. 4864 (U.S. Jun. 17, 1976), the right of a school board to dismiss teachers who struck illegally was upheld. Chief Justice Burger, delivering the opinion of the Court, said:

> The Board's decision whether to dismiss striking teachers * * * was not an adjudicative decision, for the Board had an obligation to make a decision based on its own answer to an important question of policy: what choice among the alternative responses to the teachers' strike will best serve the interests of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it? The Board's decision was only incidentally a disciplinary decision; *it had significant governmental and public policy dimensions as well*. See Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156 (1974).

Id. at 4868 (emphasis supplied). The second case, *National League of Cities v. Usery*, 44 U.S.L.W. 4974 (U.S. Jun. 24, 1976), struck down the 1974 amendments to the federal Fair Labor Standards Act which extended the Act's minimum-wage and maximum-hour provisions to most state and local public employees. Wages and hours, of course, are the essential subject matter of collective bargaining. And this Court found in *National League of Cities* that a state's power to determine the wages and hours of its public employees is an "undoubted attribute of state sovereignty", *id.* at 4977, saying further:

> Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies.

Id. at 4979. By the same reasoning, collective bargaining in the public sector is a process of making "essential decisions

regarding the conduct of integral governmental functions." That is, it constitutes a political process. *See id.* at 4980.

The foregoing materials leave no room for doubt of the permeatingly political character of public-sector collective bargaining and hence of public-sector unionism.[22] Every competent person who has expressed an opinion on the subject – whether as judge, disinterested student, or participant in the process – has emerged with the same conclusion: public-sector collective bargaining is an inherently and unalterably political activity; hence public-sector unions are of necessity political energumens. Every move they make, every goal they set, both shapes and is shaped by the political environment in which they operate. When the Teachers are required as a condition of their employment to finance the activities of the appellee Union, they are thereby forced to associate themselves, whether they like it or not, with a political and ideological program which they oppose. Such forced political and ideological conformity is incompatible with everything that this Court has had to say about the Bill of Rights from the beginning.

b. Forcing the Teachers to finance partisan political activities is unconstitutional.

The same conclusion is inevitable when we turn to an examination of the *partisan* political activities in which public-sector unions are compelled to engage as a consequence of the inherently political character of their collective-bargaining activities. The activities and expenditures of

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[22]For other judicial commentary viewing public-sector bargaining as political in character, *see* Winston-Salem/Forsyth County Unit, Educators Ass'n v. Phillips, 381 F. Supp. 644, 647-48 (M.D.N.C. 1974) (three-judge court); Pennsylvania Labor Rel. Bd. v. State College Area School Dist., ____ Pa. ____, ____, 337 A.2d 262, 264 (1975).

public-sector unions are as political in character when directed to such partisan activities as supporting the election of sympathetic public officials, or opposing the election of unsympathetic candidates, as they are when confined to the directly political activity called public-sector collective bargaining.

The Teachers' complaints allege that the Union engages in partisan political activities (A.12, 48-49). The Michigan Court of Appeals has held it reasonable to assume that a portion of every union's budget goes to such activities as the support of candidates for public offices and lobbying for the passage of legislation (A. 101). *Accord, Smigel v. Southgate Community School District*, 388 Mich. 531, 542-43, 202 N.W.2d 305, 308 (1972), *quoting Retail Clerks, Local 1625 v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963).

Thus there is no need to re-emphasize here the determination of all unions, public-sector as well as private-sector, to take an active, or more active, part in partisan politics. *Cf. GERR* No. 585, at A1 (Dec. 16, 1974); *id.* No. 613, at B4-5 (Jul. 7, 1975); *id.* No. 626, at B2-3 (Oct. 6, 1975); *Daily Labor Report* No. 28, at A3 (Feb. 10, 1976); *id.* No. 29, at A4 (Feb. 11, 1976). But an example close to this case may not be amiss:

> [One of the anomalies] of collective bargaining in the public sector is that the union can often invade the management decision-making structure. Particularly in public school and junior college districts, organized teacher groups have succeeded in electing their members, relatives, or sympathizers to school and governing boards. Under these circumstances it is often impossible for the management decision-making group to hide its bargaining strategy and tactics from employees. Democratic government does allow almost anyone to run for office, but this tactic may make collective bargaining a farce.

Clark, "Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem", 44 *Cinn. L. Rev.* 680, 686-87 (1975), *quoting* Rehmus, "Constraints on Local Governments in Public Employee Bargaining", 67 *Mich. L. Rev.* 919, 926 (1969).

The American Federation of Teachers, parent organization of the appellee Union (A.12, 24-25, 48-49), publishes regularly a journal called *AFT in the News.* A conservative estimate would put at 50 percent the proportion of this publication which is devoted to direct and express political action while the remainder is colored by the intrinsically political character of all the collective bargaining in which the unions affiliated with the American Federation of Teachers engage. *See, e.g.*, "Union leader advises politicking for teachers", "TEACHERS KICK IN FUNDS FOR POLITICAL ACTION", *id.* Nov. 16, 1975.

AFT in the News for April 1976 reprints a story from the (Jacksonville, Fla.) *Times-Union* of March 28 of this year to the effect that the AFT Florida affiliate has called for removing the constitutional ban on a state income tax and for major changes in the present state tax structure because "the state will be unable to meet the growing government services needs of citizens under the present tax structure, and state taxing efforts are minimal in comparison to revenue potential." This is a valuable example of the relationship between the union's partisan political activities and its inherently political collective-bargaining activities. The Florida affiliate of the AFT is undoubtedly seeking an increased tax base in order to finance its collective-bargaining demands. *But suppose that individual teachers are more interested in keeping taxes down?*

The Teachers have alleged in the complaint, and averred in an affidavit, that the fees they are forced to pay to the appellee Union go in part toward financing the parent AFT, which publishes *AFT in the News*, as well as toward the appellee Union's inherently political collective-bargaining activities and its more directly partisan political efforts (*see* A. 12-13, 24-27, 48-49). May the Teachers constitutionally be required to help finance activities such as the foregoing – activities which militate equally against the interests of the political electorate and the Teachers' own convictions as citizens and professional educators?

c. Compulsory financing of the Union's political activities abridges the Teachers' rights as educators and citizens.

The Teachers believe that their rights both as citizens and as professional educators are infringed by the obligation which has been imposed upon them to finance both the inherently political collective-bargaining activities of the appellee Union and its more directly partisan political activities. They believe that they have a right both to refuse to finance political activities which they oppose and to maintain intact the resources they have earned in order uninhibitedly to pursue their own political and professional preferences.

The Teachers believe that theirs is an *a fortiori* case from *Pickering v. Board of Education*, 391 U.S. 563 (1968) – a decision which the appellees and the courts below have ignored. And they believe that *Hanson, Street*, and *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963)–upon which the appellees and the Michigan courts have exclusively relied–are in the main irrelevant to this case; but that, to the extent that they are relevant, they are authority for the Teachers, not for the Union or for the Board. As previously noted, we intend to deal separately with *Hanson, Street*, and *Allen* in Part III., *infra* p. 187, because of the reliance placed on them below.

Pickering held that under the First Amendment a teacher could not be discharged for having made (partly false) critical statements about the board of education which employed him. Such a discharge, the Court held, abridged the teacher's First-Amendment right of free speech. But forcing the Teachers in this case to support the political activities of the Union which they bitterly oppose violates not only their free-speech rights, but their freedoms of association and political autonomy as well. Their freedom of association is definitively abrogated, and their freedoms of speech and political autonomy are abridged to the extent that they are compelled to support political views to which they are opposed. If the teacher's right in *Pickering* was infringed, the

rights of the Teachers here have been triply infringed. That is why they believe that theirs is an *a fortiori* case from *Pickering*.

There can be no question in this case, as there was in *Pickering*, that the Teachers' conduct might in some way impair their teaching function or fall short when measured by a valid "job-related" set of standards. *Cf. Washington v. Davis*, 44 U.S.L.W. 4789, 4791 (U.S. Jun. 7, 1976). Forced payments to a union and excellence in teaching surely display no evident, rational relationship. *See supra* pp. 31-34, *and infra* pp. 132-37. If this Court has been correct in emphasizing the existence of a positive correlation between academic freedom and excellence in teaching, *Pickering*, 391 U.S. at 572; *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967), the exact contrary is more likely: that forcing the Teachers to pay tribute to an organization they despise, and to finance objectives to which they are opposed, will deaden their enthusiasm for a profession which, as anyone who has ever had anything to do with it knows, can mean everything to students and to society when practiced with enthusiasm, and worse than nothing where enthusiasm is gone.

So completely without redeeming quality do we believe the agency-shop in public education to be, that we cannot see how the Court can help finding against it. We will attempt now to show that what has been done to the Teachers is more than merely *prima facie* unconstitutional: it is absolutely and indefensibly unconstitutional.

II.

The agency-shop is a direct and broadly based attack on the Teachers' associational autonomy which not only finds no warrant in any substantial or legitimate state interest, but also frustrates achievement of the state's compelling duties to protect the values inherent in academic freedom, to preserve a genuinely representative government, and to prevent any impairment of governmental sovereignty.

We have established that the First and Fourteenth Amendments' guarantee of freedom of association necessarily implies an equivalent freedom of *non*association, which secures for all individuals the constitutional privilege to refuse to contribute financial support to any private organization. We have therefore shown that the PERA agency-shop scheme is *prima facie* an infringement of the Teachers' freedom of association—an infringement exacerbated by the inherently political character of the Union's activities. *Supra* pp. 62-76. Now we shall apply to the agency-shop the constitutional tests appropriate where *prima facie* infringements of speech, association, petition, and other "preferred" freedoms are involved.

We begin with *United States v. O'Brien*, in which this Court drew upon a host of earlier decisions to define the limits of permissible governmental infringement of protected liberty as follows:

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, * * * a government regulation is sufficiently justified if it is within the constutitional power of the Government; if it

> furthers an important or substantial governmental interest; if the governmental interest is unrelated to the supression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 376-77 (1968). *O'Brien* is an appropriate point of departure for our inquiry into the *per se* unconstitutionality of the agency-shop scheme, not only because of the careful detail with which it elaborates the elements of constitutional analysis applicable here, but also and especially because, with but a single exception, all of the precedents on which it relied were concerned with freedom of association. *NAACP v. Button*, 371 U.S. 415, 438, 444 (1963); *NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449, 464 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); and *Sherbert v. Verner*, 374 U.S. 398, 403, 406, 408 (1963) (freedom of religion). In *O'Brien*, this Court distinguished between two situations: first, it made clear that the exercise of a concededly delegated governmental power for the illegitimate purpose of suppressing First-Amendment liberty *as such* is unconstitutional *per se*. And secondly, it reiterated the familiar "balancing test" by saying that for government even incidentally to infringe First-Amendment freedom, albeit in the otherwise valid exercise of a delegated power for a legitimate purpose, is unconstitutional—unless the state demonstrates that that exercise serves a compelling public purpose by the means least restrictive of protected liberty.

We shall show here that the agency-shop scheme is unconstitutional under both the *per se* and the "balancing" tests. In Part II.A., *infra*, we shall demonstrate that the scheme is unconstitutional *per se* because it constitutes a *direct* attack upon the Teachers' freedoms of speech, association, and petition *as such*, for the benefit of a private organization the interests of which are not only distinct from

but even inimical to the public interest. In Part II.B., *infra* p. 115, we shall demonstrate that, even if the scheme were merely an *indirect* infringement upon the Teachers' First- and Fourteenth-Amendment liberties, it would nevertheless be unconstitutional on its face because it is not the least-restrictive means necessary to achieve a substantial public goal, but rather is an overbroad delegation of power to a private organization. And in Part II.C., *infra* p. 147, we shall demonstrate that no justification could exist for the scheme because it inexorably interferes with the state's fulfillment of at least three compelling public duties.

A.

The agency-shop scheme is a direct attempt to supress the Teachers' First- and Fourteenth-Amendment freedoms as such for the benefit of the Union.

Although this Court has decided the majority of cases raising alleged violations of the First Amendment by application of the "balancing test", it has explicitly recognized in *O'Brien* and other decisions that it cannot decide all such cases on the basis of that test. While First-Amendment freedoms may not be "abstract absolutes", in the sense that they may never be regulated, limited, or infringed in any way or for any reason, there do exist certain categories of invalid state-action with respect to which the very terms and logic of the Constitution preclude any recourse to "weighing of interests". For example, as Mr. Justice Black long maintained, and many decisions hold, First-Amendment liberties, including freedom of association, are beyond the reach of legislation that *directly* restrains their exercise *as such*. The First Amendment's categorical ban against such "abridgments" thereby recognizes that there is at least some measure of free speech, association, and petition

which no government under our constitutional system may deny to any of its citizens for any reason. And this recognition thereby guarantees a preserve for individual autonomy, in which deliberate and purposeful state interference with protected liberty *as such* is always intolerable and unjustifiable. *Bates v. City of Little Rock*, 361 U.S. 516, 528 (1960) (Black, J., concurring); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Thomas v. Collins*, 323 U.S. 516, 543 (1945); *Schneider v. Smith*, 390 U.S. 17, 25 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971); *Grosjean v. American Press Co.*, 297 U.S. 233, 250-51 (1936); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963); *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965); *Gooding v. Wilson*, 405 U.S. 518, 527 (1972).

Specifically, this Court has indicated in several opinions that, under appropriate circumstances, freedom of association is an *unconditional* personal liberty. *Compare United States v. Robel*, 389 U.S. 258, 263 (1967), *and Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring), *with Dunn v. Blumstein*, 405 U.S. 330, 341 (1972). These statements point to a judicial consensus approaching unanimity that freedom of association is, to some significant degree, *inviolate*. And they affirm the observation of Mr. Justice Douglas that, in some very important particulars, government is *powerless* to legislate with respect to membership in a private organization *regardless of the legislative purpose sought to be served. Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 565 (1963) (concurring opinion). *Compare, e.g.*, In re *Stolar*, 401 U.S. 23, 27-28 (1971) (Black, J., for the Court), *with id.* at 35-36 (Harlan, J., separate opinion).

The PERA agency-shop scheme constitutes the sort of pervasive and purposeful state interference with the Teachers' First- and Fourteenth-Amendment freedoms that the constitutional principles enunciated in the latter decisions outlaw. For

as we shall show in Part II.A.1., *infra*, the scheme is nothing less than a paradigmatically *direct* attack on the Teachers' associational autonomy *as such*. And as we shall show in Part II.A.2., *infra* p. 99, it is not merely an inadvertent abuse of a delegated power, but the exercise of an authority not conferred by our Constitution and in violation of the first principles of our system of limited, republican government. *Cf. McCray v. United States*, 195 U.S. 27, 64 (1904); *Citizens' Savings & Loan Association v. City of Topeka*, 87 U.S. (20 Wall.) 655, 662-63 (1875).

1.

By requiring them financially to support the Union, the agency-shop scheme abridges, rather than merely "regulates", "limits", or "infringes" the Teachers' First- and Fourteenth-Amendment freedoms.

In a number of decisions, this Court has had occasion to define the fundamental constitutional distinction between *direct* and *indirect* infringements upon protected liberty as the distinction between state-action *that attempts to control the content of protected activity as such*, on the one hand, and state-action *that attempts to regulate conduct itself unrelated to the exercise of the freedoms of speech, association, or petition*, on the other. And it has had occasion to emphasize that, if the latter is permissible under extraordinary circumstances, the former can never be under any circumstances. For the meaning of the First and Fourteenth Amendments is that *government has no power to foster orthodoxy of thought and action*, either by restricting "deviant" expression and association, or by extending unusual protection, encouragement, and support to officially acceptable ideas or groups. The Constitution disables the state from controlling the *content* of the exercise of any protected liberty—whether government seeks to *prevent* an individual

from speaking, associating, or petitioning because of the subject-matter of his speech, or the identities of his associates; or to *compel* him to speak, associate, or petition so as to promote a favored viewpoint or to advance a particularly influential group. *NAACP v. Button*, 371 U.S. 415, 444-45 (1963); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Chicago Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261 (1974) (White, J., concurring); *Board of Education v. Barnette*, 319 U.S. 624, 633, 642 (1943).

Moreover, since constitutional guarantees protect the substance of individual liberty against subtle as well as heavy-handed interference, government has no greater power to employ devious devices—in the guise of "taxes" or otherwise, and whether directly or in league with private parties—either to stifle speech and association, or to compel them. *See Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Miami Herald Publishing Co.*, 418 U.S. at 256.

The PERA agency-shop scheme is at war with these First-Amendment principles, for two reasons: (a) Rather than a mere "regulation" or "limitation of", or an "incidental infringement upon", the Teachers' conduct which is *un*related to their exercise of the freedoms of speech, association, and petition, the scheme constitutes an attempt by the Board and the Union directly to control the content of that exercise as such—by subordinating the Teachers to the Union, politically and ideologically, through forced financial support of its activities. (b) In so doing, the scheme stifles their freedom of self-determination, the freedom which is the core value, not only of the First, but also of every other Amendment set out in the Bill of Rights. *Cf. supra* pp. 62-80.

a. The agency-shop scheme is a direct invasion of First- and Fourteenth-Amendment freedoms as such.

In *United States v. O'Brien*, this Court delineated the preconditions necessary for application of the "balancing test" by holding that, when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the "nonspeech" element can justify *incidental* limitations on First-Amendment freedoms. 391 U.S. 367, 376 (1968). As described in *O'Brien*, then, the test applies *only* to *in*direct infringements upon speech, association, or petition which arise inadvertently out of otherwise valid regulation of conduct itself unrelated to the exercise of First-Amendment freedom. It is inapplicable by hypothesis to a direct infringement on *pure* speech, association, or petition. And any such infringement is unconstitutional *per se*, no matter what governmental interests it purportedly serves.

On its face, the agency-shop scheme imposes onerous restrictions on far more than conduct *un*related to speech, association, or petition. *For the course of conduct involved when the Teachers withhold financial support from the Union, or otherwise refuse to associate with it, contains* no *element not integrally and inextricably related to their exercise of the freedoms* not *to speak*, not *to associate, and* not *to petition*. Conversely, when the Union, under color of the agency-shop arrangement, compels the Teachers to contribute financial support to its inherently political collective-bargaining activities, to that extent it extinguishes their fundamental freedom not to associate with a private, politically oriented organization. And when it expends those monies (as the statute authorizing the agency-shop scheme permits and encourages it to do) on political and ideological activism, propaganda, agitation, lobbying, and other activities intimately related to speech and petition both within and outside of the collective-bargaining process, it extinguishes as

well the Teachers' fundamental freedoms not to speak in support of political causes and candidates, not to lobby or petition government on behalf of particular policies and programs, and generally not to participate in the promotion of ideas (irrespective of whether they agree or disagree with those ideas). *See supra* pp. 40-56, 62.

If Union representatives approached any of the Teachers and said: "You must extol the merits of our organization to nonunion public employees"; or "You must participate at our meetings in the formation of collective-bargaining and other political strategies"; or "You must appear at a public session of the Board and speak on behalf of our position in the pending negotiations"; or "You must repair to the capitol and lobby for measures in our economic interest"; or "You must draft articles for a union newspaper to convince citizens that our political goals are in the public interest"; or "You must encourage voters to support candidates favorable to us at the next election"–if, indeed, the Union straightforwardly demanded any of these things from the Teachers, and enlisted the power of the state to coerce their compliance with its demands, would the appellees have the temerity to deny, or would this Court hesitate to declare, that such compulsion was repugnant *per se* to the First and Fourteenth Amendments? This, or course, is not the Union's way. Unlike the simple and romantic highwayman who cried "Stand and deliver!", the Union resorts to a more sophisticated and far safer means to "redistribute wealth" from the Teachers' salaries to its political schemes: the agency-shop "check off". But the overall result is the same. Through the expenditure of the agency-fees, the Union in effect coerces the Teachers' participation at union meetings; their public praise for the organization, its activities, and its principles; their presence before the Board and their petitions in executive and legislative chambers pressing the Union's position on administrators and lawmakers; their propaganda among the general public; and their preachments for candidates and causes from

political pulpits. And, if doing these things by engaging with the state to compel the Teachers' physical presence and performances would violate the First- and Fourteenth-Amendments' ban against enforcing political and ideological conformity, can there be any constitutional difference where the Union arranges with the Board regularly to siphon off portions of the Teachers' salaries to surrogates who will act in their stead with the stored up (and, indeed, more easily managed) value of their previous labors? Are not both situations, for all logical and constitutional purposes, identical?

We believe they are. And more importantly, we believe that, because they are, this Court will refuse to characterize the workings of the agency-shop scheme as a mere "regulation" or "limitation" of some (undefined) conduct of the Teachers *un*related to the exercise of their First-Amendment freedoms, but instead will identify the scheme as in effect a direct "tax" on the exercise of a set of fundamental freedoms–a "tax" on belief, expression, and association applicable to all public employees in Michigan who eschew affiliation with labor unions. For that, in essence, is what it is. And, as such, it is a *direct* infringement, or *abridgment*, of the Teachers' liberty–in the truest sense, *a literal violation of the First and Fourteenth Amendments*.

Nearly twenty years ago, this Court denied the State of California the power to withhold a tax exemption from an individual because of his ideological support for politically subversive ideas and causes. *Speiser v. Randall*, 357 U.S. 513 (1958). Today, the State of Michigan purports to "tax" those of its public-school teachers who *refuse* to support labor organizations because it considers their refusal subversive. The parallel renders poignant the observation of Mr. Justice Black on that earlier occasion, that "a levy of this nature is wholly out of place in this country" and "constitutes a palpable violation of the First Amendment." And even more now than then is there wisdom in his warning that the necessity to

consider the invalidity of such an affront to the Constitution in this Court "only emphasizes how dangerously far we have departed from the fundamental principles of freedom declared in the First Amendment." *Speiser*, 357 U.S. at 529-30 (concurring opinion). For, in operation and effect, the agency-shop scheme (as construed by the Michigan Court of Appeals) constitutes a classic *prior restraint* on the freedoms protected by the First and Fourteenth Amendments. It is a novel and peculiarly vicious *form* of restraint, to be sure, since it strikes selectively at the "negative" liberties secured by those Amendments. But it is in *substance* the same sort of device which crops up generation after generation to serve the desire of a prevailing orthodoxy for censorship—and which, again and again, this Court has held out of place under our constitutional system.

A "restraint", in the most general sense, is a penalty or deprivation which the state (unconstitutionally) imposes on an individual for exercising his First-Amendment freedoms. Thus, if the state requires payment of a "license fee" as a prerequisite to permitting speech, it imposes on the individual a restraint on his "positive" freedom. If, conversely, the state requires speech as a prerequisite to receipt of a benefit to which the recipient would otherwise be entitled, it imposes on the individual a restraint on his "negative" freedom to remain silent. And similarly for the freedoms of association, petition, and the press. In this case, the State of Michigan requires the Teachers to acquiesce in a process through which they are "taxed" to finance the political and ideological activism of the Union as a condition of continued public employment in the Detroit schools. This is a restraint on both their "positive" and their "negative" First-Amendment freedoms. It is a restraint on their "positive" freedoms for the simple reason that every dollar of their financial resources which the state "taxes" from them because of their nonassociation with the Union is a dollar they cannot invest in the promotion of their own ideas and values. *See Seay v. McDonnell Douglas*

Corp., 427 F.2d 996, 1004 (9th Cir. 1970). And it is a restraint on their "negative" freedoms because every dollar of the agency-shop "tax" is immediately directed into a program of political and ideological activism the precise purpose of which is to promote ideas and values which the Teachers, by their very nonassociation with the Union, have demonstrated they oppose in principle and practice. *Cf. Cort v. Ash*, 422 U.S. 66, 84 (1975).

In the case of both "positive" and "negative" restraints, the state (or some private party acting in complicity with it) serves as a licensor, or censor, of (for example) speech. In the case of a restraint on "positive" freedom, however, the state may very well exercise no substantive control over what is said, or by whom, preferring merely to "tax" the privilege of speaking *per se*. It is possible, therefore, to imagine a restraint of this type as operating in a "neutral" fashion—that is, restricting all communication equally, without discrimination among speakers or ideas. Whereas, in the case of a restraint on "negative" freedom such as the agency-shop scheme, the very purpose of the exaction is precisely to compel particular kinds of speech by particular persons. A "negative" restraint of this kind, therefore, is decidely more odious than a "positive" restraint that merely burdens (albeit unconstitutionally) the privilege of speech but does not extinguish it.

All such restraints, we submit, are unconstitutional *per se*. For our Constitution presupposes that each individual will be able to exercise and enjoy *all* of his fundamental rights, powers, privileges, and immunities *simultaneously*. He need not sacrifice his right to property in order to exercise his "positive" freedom of speech. And he need not acquiesce in a denial of an equal opportunity to serve as a public employee in order to exercise his "negative" freedom of speech, either.

We put forward these hopefully self-evident propositions, because we recognize that, generally speaking, history has witnessed "positive" restraints in profusion, but few "negative" ones. This perhaps can be traced to the reluctance of

governments, prior to the twentieth century, to interfere with the personal beliefs of their citizens so long as those beliefs did not manifest themselves in overt criticism of the ruling stratum of society. With the emergence of totalitarian ideologies in modern times, however, came demands that the citizens not only refrain from criticism of the state, but also *affirmatively* "love Big Brother", by constant professions of allegiance to and faith in the state, the party, or the leader. And, as this case witnesses, such ideas have now been put into practice by associations other than the state.

In numerous decisions, this Court has condemned as unconstitutional *per se* restraints upon the "positive" freedoms of speech, association, and assembly. When a regulation strikes at the very foundation of First-Amendment liberty by subjecting it to license and censorship, this Court has never hesitated to declare that regulation invalid on its face, regardless of the legislative motive which induced its adoption. *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938); *accord, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951); *Staub v. City of Baxley*, 355 U.S. 313, 321-25 (1958). No rational basis exists for applying a contrary rule where, as here, the state attempts to subject the freedoms not to speak, not to associate, and not to petition to the capricious power of a private licensor.

The immunities guaranteed by the First and Fourteenth Amendments invalidate *all* governmental restraints upon the arena of public discussion, in the belief that no other approach comports with the premise of human dignity and choice upon which our political system rests. *Cohen v. California*, 403 U.S. 15, 24 (1971), *citing Whitney v. California*, 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring). If this respect for and reliance upon individual autonomy animates the "positive" protections of the First and Fourteenth Amendments, it inspires even more insistently

the security those Amendments provide for the "negative" freedoms of silence, individuality, and political independence. For "the right to remain silent in the face of an illegitimate demand for speech" is not merely "as much a part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence." *Russo v. Central School Dist. No. 1*, 469 F.2d 623, 634 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973). Rather, if any hierarchy exists among fundamental personal liberties, it entitles the freedoms to refrain from speech, association, and petition to a position even more "preferred" than that of the freedoms to speak, associate, or petition. Since our Constitution grudgingly tolerates censorship or suppression of First-Amendment liberty only under the most extraordinary and clearly demonstrated circumstances of grave and imminent public danger, it follows that the state can command involuntary affirmation or association (if at all) only on grounds even more immediate and urgent. *Compare Bridges v. California*, 314 U.S. 252, 263 (1941), *with Board of Education v. Barnette*, 319 U.S. 624, 633 (1943).

Therefore, the prior restraint worked by the agency-shop scheme here is beyond constitutional redemption. "If there is any fixed star in our constitutional constellation", wrote Mr. Justice Jackson, "it is that no official, high or petty, can prescribe what shall be orthodox in politics * * * or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642, *quoted in Street v. New York*, 394 U.S. 576, 593 (1969). And what the state itself may not restrain is certainly beyond the censorial competence of private parties "negotiating" with government officials under color of delegated authority. *See supra* pp. 56-62. Having no power itself to abridge First- and Fourteenth-Amendment liberty, the Michigan Legislature cannot grant the power to the Union to do so—through "contracts" with the Board, or otherwise. *International Association of Machinists v. Street*, 367 U.S. 740, 777 (1961) (Douglas, J., concurring).

b. The agency-shop scheme denies the Teachers their freedom of self-determination.

The agency-shop scheme is not merely a direct invasion of First- and Fourteenth-Amendment liberties in the form of a prior restraint upon the Teachers' freedoms not to speak, not to associate, and not to petition. It is also an attempt by the Board and the Union, under color of state law, to suppress the Teachers' political and ideological autonomy. And, as such, it constitutes a naked assault upon the most basic and precious value inherent in our Constitution.

It is a truism of our constitutional jurisprudence that the ultimate purpose of the First and Fourteenth Amendments is to preclude the state from dictating how individuals should exercise their fundamental liberties of speech, association, and petition. It is a truism—but it embodies a proposition far from trivial. The Founders of our Republic knew that different eras must struggle with the demands of different orthodoxies, but that the contradiction between state-imposed conformity and individual human dignity never varies. Too wise and too humble to cast themselves in the rôles of omniscient "guardians" capable of giving permanent substantive content to men's beliefs, they were also too conversant with the history of tyranny to believe that such self-styled "guardians" of thought and action might not someday appear. Therefore, they carefully designed the First Amendment, and the whole Bill of Rights, to preserve inviolate an area for individual free choice—to prove that their Constitution did not delegate an all-embracing totalitarian authority to the state in the realm of beliefs and associations.

The Amendments they drafted, and especially the First, protect rights and privileges essential to the workings of a free society. But, if so, then in the very nature of things the exercise of the liberties those Amendments guarantee can never be the subject of governmental dictation. Liberty, strictly speaking, does not exist with respect to any action

that the state can compel; and if there are no actions that the state cannot compel, freedom (in a constitutional sense) is nonexistent. A people cannot be free if the liberties essential to their freedom are not privileges, but duties; not immunities, but liabilities. Therefore, the essential and defining characteristic of any freedom, and especially a *fundamental* freedom, is that its exercise always remains a matter of untrammeled individual choice and judgment. *See, e.g., Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 588 (D.C. Cir. 1975) (freedom of association), *cert. denied*, ____ U.S. ____, 96 S. Ct. 1147 (1976).

In *Board of Education v. Barnette*, this Court explicitly recognized that the exercise of the freedom secured by the First and Fourteenth Amendments is itself the subject of a further, and even more basic freedom: the freedom of self-determination. Invalidating a requirement that dissenting public-school students conform ideologically by reciting a pledge of allegiance, the Court found that:

> The freedom asserted by [the students] does not bring them into collision with rights asserted by any other individual. * * * *[T]he refusal of these persons to participate in the [flag-salute] ceremony does not interfere with or deny the rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and the rights of the individual.* The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. *The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.*

319 U.S. 624, 630-31 (1943) (emphasis supplied). More recently, this Court re-emphasized the centrality of the freedom of self-determination to our system of constitutional immunities for the individual, when it held that a defendant in a criminal case has a constitutional right and privilege to represent himself. As Mr. Justice Stewart observed on that

occasion, "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice". *Faretta v. California*, 422 U.S. 806, 833-34 (1975) (Sixth Amendment).

Barnette and *Faretta* thus recognize a fundamental principle that permeates the entire structure of our Constitution and speaks with a voice of equal eloquence and vigor from the platform of each of the Articles of the Bill of Rights. Each Amendment guarantees a particular freedom directly and personally to the individual. And the structure of each necessarily implies the further inherent and inalienable right to self-representation in the exercise and enjoyment of that freedom—a right for each individual personally to decide whether the exercise or nonexercise of some guaranteed liberty is to his advantage in his particular circumstances.

In its necessary operation and effect, the PERA agency-shop scheme is an unequivocal contradiction of the Teachers' freedom of self-determination. To the extent that they are required to finance the Union's political and ideological activism as a condition of continued public employment, the Teachers no longer direct their own socio-political destinies. Instead, the scheme degrades them to the status of captive workers financially shackled for the advancement of a militantly activist movement with the goals and methods of which they vigorously disagree, and over the direction of which they have neither control nor influence. This result is not the freedom of self-determination in political affairs which is the cornerstone of our limited, republican government. *Cf., e.g., Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). Neither is it any form of "freedom" compatible with the libertarian presuppositions of our Constitution. Rather, *it is a new species of ideological serfdom at war with the belief in personal choice, self-determination, self-fulfillment, and (ultimately) individual human dignity upon which our*

forefathers premised the American social and legal systems.

There is no place here for the argument that the agency-shop scheme is in any way "necessary" to "balance 'competing rights' ". For no such "competition" exists. The refusal of the Teachers to participate in or support the Union's political and ideological activism does not and cannot deny or interfere with the liberty of others to do so. The sole "conflict", then, arises from the demand of the Union to impose its orthodoxy upon dissenters, and from the complicity of the State of Michigan in the Union's design to compel the Teachers to "love Big Brother". This is a conflict not between "competing rights", but between liberty and tyranny—between freedom of self-determination in belief, expression, and association on the one hand; and political thought-control, on the other.

To be sure, the Union may in fact expend monies coerced from the Teachers through the agency-shop scheme to support political action arguably favorable to them. But fortuitous "benefits" of this kind cannot insulate the scheme from constitutional condemnation. For, as Mr. Chief Justice Burger has said, "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan v. Post Office Department*, 397 U.S. 728, 738 (1970). After all, the very purpose of the Bill of Rights was to free people from governmental interference with their affairs, whether in the purported interest of their "welfare" or otherwise. Therefore, there is no place either in constitutional analysis generally, or in this case particularly, for application of the vicious philosophy that limitations on governmental power may be brushed aside on the plea that "good", perchance, may follow. *Schneider v. Smith*, 390 U.S. 17, 25 (1968); *Jones v. SEC*, 298 U.S. 1, 27 (1936).

In the final analysis, moreover, any "weighing" of the possible "benefits" from the agency-shop scheme would be, not only an exercise in supererogation, but also a perversion of constitutional principle. On its face, the scheme is the

source of irreparable injury to the Teachers. For once the Union has expended coerced monies to promulgate its political and ideological viewpoints and to apply its political influence in collective bargaining and otherwise, the effect of that spending cannot be withdrawn from the marketplace of ideas, the voting booth, the legislative chamber, or the negotiating process. *See Cort v. Ash*, 422 U.S. 66, 84 (1975). Admittedly, the exact financial *quantum* of harm occasioned by the agency-shop may be difficult to prove. But, as Mr. Justice Douglas observed in a related context, the unconstitutionality of such a scheme "turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (concurring opinion). The harm, in short, is the interference with the Teachers' intangible but invaluable freedom of *self*-determination, a harm as plain here as it is in contemporary totalitarian states, where tyrannically paternalistic "vanguard parties" purport to shape the political and ideological destinies of dissenting citizens. And, given that harm, only one result is constitutionally conceivable.

If, as this Court held in *Barnette*, the freedom of self-determination permits individual public-school students to refuse to conform to the ideological prescriptions of the state; and if, as this Court held in *Faretta*, the freedom of self-determination permits an individual criminal defendant to refuse to accept a spokesman designated by the state—then surely here this Court must hold that the same freedom secures for the Teachers both a privilege to refuse to extend to the Union the unlimited discretion to spend their money on political and ideological activism, and an immunity from compulsion under color of law to accede to such spending. After all, there is no rational basis on which to distinguish, for constitutional purposes, between compelled affirmation or acceptance of counsel, on the one hand, and compelled

financial support of the political and ideological activism of a trade union, on the other. For, with respect to the freedom of self-determination, "a trade union [is] the same kind of protector of [one's] interests as an official lawyer before a tribunal". 2 A. I. Solzhenitsyn, *The Gulag Archipelago, 1918-1956*, at 607 (T. P. Whitney transl. 1975).

2.

The agency-shop scheme compels the Teachers to advance the private interests of the Union at the expense of their own First- and Fourteenth-Amendment freedoms.

This observation of a profound student of contemporary affairs points up another, and perhaps decisively, critical defect in the PERA agency-shop scheme: namely, that it elevates the interests of the Union over the interests of both the Teachers and the public. We shall deal in detail with the adverse effect of the agency-shop on the public interest *infra* pp. 147-86. Here we shall show: (a) that there is nothing in the nature of public-sector unions generally, or of the appellee Union specifically, which suggests any pecular justification for subordinating the Teachers to it through the agency-shop scheme; and (b) that the logic of collective bargaining exposes the entire process as one designed to advance the special interests of the Union.

a. The Union has no special privilege to abridge the Teachers' First- and Fourteenth-Amendment freedoms.

Although unions themselves are (as it were) embodiments of the exercise of freedom of association, they enjoy no special legal status as against nonunion employees on that account. Therefore, even though the agency-shop scheme

promotes the capacity of union members to compel others to associate, speak, and petition with them, and in that sense might be said to enhance their union's potential for political activism, it is not in virtue of that result insulated from constitutional scrutiny. To the contrary. For, to the extent it secures such a benefit for union members, it does so only by imposing on dissenters a corresponding cost in terms of denials of the latters' fundamental freedoms of association, speech, and petition. And our Constitution recognizes no right or privilege in any group to attempt to enhance the exercise of its own members' liberty by restricting the otherwise equal liberty of nonmembers—either by demanding special concessions from the state, or by seeking to enforce oppressive agreements to the detriment of nonsignatory third parties. *See, e.g., Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949); *Buckley v. Valeo*, ___ U.S. ___, ___, 96 S. Ct. 612, 648-49 (1976); *City of Charlotte v. Local 660, Firefighters*, 44 U.S.L.W. 4801, 4802-03 (U.S. Jun. 7, 1976); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

Neither can the appellee Union claim a special position because it adventitiously numbers among its members a majority of the employees in the collective-bargaining unit to which the Teachers have been assigned. For our Constitution does not recognize any doctrine of unlimited majority rule, whether the majority is composed of one's co-workers, one's "class", or one's countrymen. Rather, it conditions the exercise of all governmental authority on the state's recognition and protection of the basic individual liberties enumerated in the Bill of Rights, in effect permanently withdrawing the subject-matter of those liberties from the vicissitudes of political controversy—whether in the electoral process, the legislature, or the administration of public employment. *E.g., Board of Education v. Barnette*, 319 U.S. 624, 638 (1943); *Gordon v. Lance*, 403 U.S. 1, 6 (1971); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713;

736-37 (1964); *see Kingsley International Pictures Corp. v. Regents of New York University*, 360 U.S. 684, 689 (1959); *State v. Nemaha County*, 7 Kan. 549, 555 (1871) (Brewer, J., dissenting).

Nor can the Union rely upon its status under Michigan law as an exclusive representative. This appeal does not present the question of the unconstitutionality of exclusive representation in public employment. None the less, exclusive representation colors the issue raised here because of the statement of the Michigan Legislature that the purpose of the agency-shop scheme is to compel all employees in a bargaining unit to "share fairly in the financial support" of a majority union. PERA §10(2), Mich. Stat. Ann. §17.455(10)(2) (1975 rev.). We do not suggest, however, that this Court grapple with the complex problem of exclusive representation in the instant proceeding. Indeed, quite the opposite. *E.g., Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). But we do submit that this Court should be alert to, and should not countenance, any attempt by the Union or the Board to shield the question of the unconstitutionality of the agency-shop behind that of exclusive representation. Exclusive representation can provide the Union with no support for two reasons:

(i) Neither the process of collective bargaining nor the status of an exclusive representative is constitutionally mandated in the public sector. Both are mere statutory privileges. *E.g., Lontine v. Van Cleave*, 483 F.2d 966, 968 (10th Cir. 1973); *Local 1954, Teachers v. Hanover Community School Corp.*, 457 F.2d 456, 461 & n.13 (7th Cir. 1972); *Vorbeck v. McNeal*, 407 F. Supp. 733, 739 (E. D. Mo. 1976) (three-judge court), *aff'd mem.*, 44 U.S.L.W. 3737 (U.S. Jun. 21, 1976); *Confederation of Police v. City of Chicago*, 382 F. Supp. 624, 628-29 (N.D. Ill. 1974); *Local 794, Firefighters v. City of Newport News*, 339 F. Supp. 13, 16-17 (E.D. Va. 1972) (three-judge court); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969)

(three-judge court). And inquiry into the unconstitutionality of the agency-shop scheme in its own right cannot be avoided simply because that scheme is an incident of the PERA plan for exclusive representation. Indeed, to admit otherwise would be to cast aside the rule that statutes (such as the agency-shop scheme) which infringe First- and Fourteenth-Amendment freedoms are presumptively unconstitutional. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963). *See infra* pp. 117-20.

(ii) Far from being a constitutional *right*, exclusive representation in public employment may well be a constitutional *wrong* no less (and perhaps more) repugnant to our system than the agency-shop. Aspects of its invalidity are pending before this Court in another case; and a broadly based constitutional challenge may soon be presented for review. *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission, prob. juris. noted,* ___ U.S. ___, 96 S. Ct. 1408 (1976); *Knight v. Minnesota Community College Faculty Association*, No. 4-74 Civ. 659 (D. Minn., filed Dec. 19, 1974), *petition for mandamus granted sub nom. Knight v. Alsop*, No. 76-1051 (8th Cir., May 17, 1976) (ordering convention of statutory three-judge court). Until the question is settled, however, this Court should not permit the Union or the Board to argue from the unarticulated major premise that exclusive representation in the public sector is constitutionally invulnerable—at least if such an argument is intended to weaken the presumption against the validity of the agency-shop scheme.

b. The agency-shop scheme serves the Union's special interest at the Teachers' detriment.

Neither can the Union derive any aid or comfort from its rôle in the PERA collective-bargaining process. The Union's position in this case would arguably be strengthened if, in collective bargaining, it performed the functions of a *public agency*, or if its officers were *public officials*. For under such circumstances, this Court would scan the constellation of special constitutional principles applicable to such public organizations as the integrated bar, to chart the proper course of decision. Such a situation does not obtain here, however. Rather, the contrary is true.

Although the Union's members, and perhaps its chief officers, are public *employees*, they are not by virtue of that status also public *officials*. The distinction between public employment and public office, after all, is fundamental. Public employment involves no more than the fulfillment of *contractual* duties of a public nature—whereas, in addition to the essential characteristics of tenure, duration, emolument, and duties fixed by law, public office involves *an exercise of some part of the sovereign power of the state*. And that exercise, by hypothesis, must be undertaken *for the benefit of the public*, not merely of the office-holder. *E.g.*, *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 519-20 (1926); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); *Yaselli v. Goff*, 12 F.2d 396, 403-04 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927); *Chapman v. Gerard*, 341 F. Supp. 1170, 1173-74 (D.V.I. 1970), *aff'd*, 456 F.2d 577 (3d Cir. 1972); *Cain v. United States*, 73 F. Supp. 1019, 1021 (N.D. Ill. 1947); *Wetzel v. McNutt*, 4 F. Supp. 233, 234 (S.D. Ind. 1933); *Meiland v. Cody*, 359 Mich. 78, 87, 101 N.W.2d 336, 341 (1960); *Schobert v. Inter-County Drainage Board*, 342 Mich. 270, 281, 69 N.W.2d 814, 820 (1955); *Heiliger v. City of Sheldon*, 236 Iowa 146, 154-55, 18 N.W.2d 182, 187 (1945); *Martin v. Smith*, 239 Wis. 314, 330, 332-33, 1 N.W.2d 163,

169, 171-72 (1941); In re *Olson*, 211 Minn. 114, 117, 300 N.W. 398, 400 (1941); *State v. Lofthus*, 45 N.D. 357, 362, 177 N.W. 755, 757 (1920).

The Union's role in collective bargaining is neither structured in theory, nor operates in practice, to achieve the public interest. To the contrary. In the absence of collective bargaining, terms and conditions of public employment arise through the fluid "give and take" of the political process, in which public employees may participate (at least as voters) on an equal basis with all other citizens. And, as matters of absolute legislative discretion in the final analysis, such terms and conditions as the state chooses to establish are conclusively in the public interest. *For the public interest is precisely what emerges from the proper functioning of our system of limited, representative government*. The underlying assumptions of public-sector collective bargaining, *per contra*, are: (i) that, irrespective of their coincidence with the public interest, terms and conditions of employment set "unilaterally" by public officials are somehow "unfavorable" to public employees; and (ii) that therefore these officials should be required to negotiate *other* terms and conditions with public-employee unions exercising an extraordinary measure of *political* "bargaining power" through such devices as exclusive representation, the agency-shop, compulsory arbitration, and the strike-threat. *See supra* pp. 62-80. Animated by these assumptions, collective bargaining in Michigan (as elsewhere) extends to the Union a special increment of political power which permits it to influence, control, or even override the normal political process. *E.g.*, Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156 (1974); *see Winston-Salem/Forsyth County Unit, Educators Association v. Phillips*, 381 F.Supp. 644 (M.D.N.C. 1974). Since the unimpeded political process is the unique source of the public interest, it follows apodictically that collective bargaining must serve some interest distinct from that of the public—to wit, the special interest of the Union.

Consideration of the *adversary* nature of collective bargaining leads to the same conclusion. The essential premise of collective bargaining is that the parties, union and employer, are separated by differences in outlook, motivation, goals, and values that cannot be resolved except through a formal process of negotiation separated from and made superior to the normal political process. *See, e.g.*, Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 *Ind. Rel.* 18, 25 (1972). One of these parties, however, is the representative and mandatary *of society*. Therefore, if collective bargaining in Michigan (as elsewhere) establishes an adversarial system in which representatives of the public interest appear on one side, the interest represented on the other side must be distinct from the public interest—to wit, the special interest of the Union.

We put forward these observations, not because the wisdom or constitutionality of compulsory public-sector collective bargaining is directly in issue here, but because properly to address the constitutional questions raised by this appeal the Court must carefully focus on the essential nature of the agency-shop scheme as an integral part of a process which operates *in the special interest of the Union* and *at the particular expense of the Teachers*. That the Union stands peculiarly to gain in several important respects from the agency-shop scheme requires little elaboration. On its face, the scheme strengthens the Union by increasing its financial resources and by coercing public employees to retain formal membership. The first is obvious enough to require no further discussion; but the second deserves particular emphasis.

American labor law makes a verbal distinction between the "union-shop" under which an employee must *join* a union as a condition of employment, and the "agency-shop", under which he need not join, in a technical sense, but must pay the union "fees" which typically (as here) equal the "dues" paid by members. The equality of fees and dues means that, in

effect, an agency-shop is merely a union-shop by another name or, as this Court has said, its "practical equivalent". *Retail Clerks, Local 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963); *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963). But if the agency-shop is the practical equivalent of the union-shop, why has this dual terminology developed? The answer is quite simple. The union-shop is illegal in jurisdictions with so-called "right-to-work" laws. *See Schermerhorn*, 373 U.S. at 750-51. Therefore, unions devised the agency-shop in an attempt by subterfuge to render "right-to-work" laws ineffective. C. Morris, *The Developing Labor Law* 707 (1971).

The unions did not succeed, however, in the private sector. Twelve states have enacted "right-to-work" laws which specifically prohibit the payment to a union of dues, fees, or other charges as a condition of private employment. *Ficek v. Boilermakers, Local 647*, 219 N.W.2d 860, 865 (N.D. 1974). The "right-to-work" laws of seven other states prohibit conditioning employment on *membership* in a labor organization, *but do not explicitly ban the payment of dues and fees as such a condition*. Nevertheless, in each of these seven states the courts or attorneys general have declared the agency-shop to be the equivalent of the union-shop and therefore illegal under the "right-to-work" law. *Arizona Flame Restaurant, Inc. v. Baldwin*, 34 L.R.R.M. 2707, 2709 (Ariz. Super. Ct. 1954), *aff'd as modified on other grounds*, 82 Ariz. 385, 313 P.2d 759 (1957); Op. Ariz. Att'y Gen. No. 62-2, 49 L.R.R.M. 107 (1961); *Schermerhorn v. Local 1625, Retail Clerks*, 141 So.2d 269, 276 (Fla. 1962), *aff'd*, 373 U.S. 746, *on rehearing*, 375 U.S. 96 (1963); *Higgins v. Cardinal Manufacturing Co.*, 188 Kan. 11, 23, 360 P.2d 456, 465, *cert. denied*, 368 U.S. 829 (1961); *Street Electric Railway Employees, Division 1225 v. Las Vegas-Tonopah-Reno Stage Lines, Inc.*, 319 F.2d 783 (9th Cir. 1963); *Guards, Local 1 v. Wackenhut Services, Inc.*, 90 Nev. 198, 204, 522 P.2d 1010, 1014 (1974); *Ficek*, 219 N.W.2d at 873; 1957-58 Op. S.D. Att'y Gen. 221 (Jul. 8, 1958); 1961 Op. Tex. Att'y Gen. WW-1018

(Mar. 14, 1961); *see Oil Workers International Union v. Mobil Oil Corp.*, 44 U.S.L.W. 4842, 4843 n.4 (U.S. Jun. 14, 1976).

The agency-shop has also met short shrift in the public sector under statutes which guarantee public employees a right to refrain from joining or supporting labor unions. For the most pertinent example, the Michigan PERA §10 originally provided no authorization for the agency-shop, but did say (as it still does) that:

> [i]t shall be unlawful for a public employer or an officer or agent of a public employer * * * to discriminate in regard to hire, terms or other conditions of employment *in order to encourage or discourage membership in a labor organization* * * *.

Mich. Stat. Ann. §17.455(10) (1975 rev.) (emphasis supplied). In *Smigel v. Southgate Community School District*, 388 Mich. 531, 202 N.W.2d 305 (1972), the Michigan Supreme Court held that an agency-shop agreement with fees equal to union membership dues and assessments was illegal under this section as an encouragement to union membership.[23] Chief Justice Kavanagh, noted in his opinion that, under PERA §10 as then written,

> an employer must assume a posture of complete neutrality regarding union *membership*. He must do nothing *to* * * * *advance* * * * *union organizing*. * * * [H]e [must] refrain from practices *which* * * * *encourage* * * * *membership in labor organizations*.
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> * * * * *
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> We hold that any such clause as this which makes no effort to relate the non-members' economic obligations to actual collective bargaining expenses is clearly

[23]The amendment to PERA §10 in issue here was the Michigan Legislature's response to the *Smigel* decision (R., Defendants' Reply Brief, In Support of Motion of Defendants for Summary Judgment In Their Behalf, On Remand, Mich. Cir. Ct., Aug. 24, 1973, at 3-5).

> prohibited * * * *as of necessity * * * encouraging * * * membership in a labor organization.*

388 Mich. at 539, 543, 202 N.W.2d at 306, 308 (emphasis supplied).

The New York Civil Service Law, similarly, provides that

> [p]ublic employees shall have the right * * * to refrain from forming, joining, *or participating in*, any employee organization * * *.

N.Y. Civ. Serv. Law §202 (McKinney 1973). In *Farrigan v. Helsby*, 68 Misc. 2d 952, 327 N.Y.S.2d 909 (Sup. Ct. 1971), *aff'd*, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973), an agency-shop arrangement was held to violate this provision. As the appellate court emphasized,

> any forced payment of dues *or their equivalent* would be in violation of [§202] *as constituting, at the very least, participation in an employee organization.*

42 App. Div. 2d at 267, 346 N.Y.S.2d at 41 (emphasis supplied).

The New Jersey public-employment act also guarantees to public employees the right not "to form, join and assist any employee organization" if they so choose. N.J. Stat. Ann. §34:13A-5.3 (1974 Cum.Supp.). In *New Jersey Turnpike Employees' Local 194 v. New Jersey Turnpike Authority*, 117 N.J. Super. 349, 284 A.2d 566 (Ch. 1971), *aff'd*, 123 N.J. Super. 461, 303 A.2d 599 (App. Div. 1973), *aff'd*, 64 N.J. 579, 319 A.2d 224 (1974), the union argued, unsuccessfully, that the act did not prohibit an agency-shop arrangement because the latter did not constitute a form of assistance to a labor organization. The reasoning of the Appellate Division is particularly pertinent here:

> The agency-shop arrangement * * * mandates that payments to the union by nonmember employees are a condition of employment; the amount of such payments is the exact equivalent of initiation fees and regular dues * * *. These clauses, though counterpoised with those which purport to relate such payments to union

> expenses [for collective bargaining] *would have the predominant effect of inducing, if not compelling, union membership, participation and assistance on the part of nonmember employees.*

123 N.J. Super at 470, 303 A.2d at 604 (emphasis supplied).[24]

Thus, court after court, in both the private and the public sectors, has held that agency-shop arrangements such as that involved here of necessity encourage union membership. After all, it is easy enough to see that an employee who must pay the equivalent of full union dues, *but by virtue of his nonmembership has no voice in internal union politics*, is stripped of any opportunity to influence the course of his own employment destiny so long as the union remains his exclusive representative (*see* A. 11, 27-28, 48). And it is easy enough to see, therefore, that a primary purpose of the PERA agency-shop authorization is to coerce independent teachers into affiliation with the Union.

Enlarged membership, of course, permits the Union to compel a greater degree of conformity among, and of joint action from, teachers—thereby enhancing its ability to engage in campaigns of partisan political activism by contributing the services of its members, or to employ strike-threat tactics as adjuncts to collective bargaining. And that the agency-shop coerces full membership-dues without requiring employees to join the Union, *and without requiring the Union to accept all employees as members*, secures an added advantage. Some nonunion employees, such as the Teachers here, would not make appropriately docile and conformist union members, passively accepting whatever their leaders told them, or donating whatever personal services their leaders asked of them. For the Union, then, their continued *non*membership is

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[24] The reasoning of the Appellate Division was adopted by the New Jersey Supreme Court in its brief opinion affirming. 64 N.J. at 581, 319 A.2d at 225.

quite desirable–provided that they are coerced into "financial-core" membership. For, in the final analysis, a continuously funded treasury is the *sine qua non* of the Union's existence, money being the necessary lubricant for the wheels of political power. As one recent and exhaustive study of the political nature of public-sector unionism reported,

> [o]nce it has been designated the exclusive bargaining representative, a high priority among a union's bargaining goals is the establishment of various types of union security devices designed to ensure the union's continued strength. * * * A[n] increasingly common device is the agency shop, in which all members of the bargaining unit are required to pay the union a fee * * *, whether or not they are members of the union. * * * [This device] increases the financial strength of the union, *which in turn increases its ability to make political contributions and to carry on effective political action programs.*
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> * * * * *
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> *The cumulative effect of exclusive recognition [and] union security devices * * * will be to produce employee organizations which possess great potential political power.* * * * [T]he campaign contributions and the cadre of willing political volunteers which large unions are able to provide * * * can make active union support extremely valuable, since * * * political campaigns are expensive undertakings. * * * [E]lected officials and their appointees may too readily accede to the demands of powerful unions in an effort to garner future political support, or at least to avoid active union opposition. By the same token, there is doubt that an elected official who has received considerable support from an employee union could subsequently be objective in dealing with matters of concern to that union.

Project, "Collective Bargaining and Politics in Public Employment" (pt. 4), 19 *U.C.L.A.L. Rev.* 887, 1010, 1035-37, 1039 (1972) (footnotes omitted) (emphasis supplied). As this study shows, then, the special privilege provided by the PERA agency-shop authorization is a benefit of singular importance to the Union.

That the Teachers stand particularly to suffer from the agency-shop is also self-evident. As we have shown, compelled financial support of the Union's activities strips them of their freedom of self-determination where speech, association, and petition are concerned. But even more importantly, it makes them unwilling purveyors of high-octane fuel to an engine of political activism on a direct collision course with the public interest. *See infra* pp. 147-86.

In sum, the PERA agency-shop scheme enlists the power of the state to "redistribute" financial resources from the Teachers to the Union's private purposes. This would be a serious enough affront to our Constitution even if the Union's activities were innocuous in their effect on the public interest. For no idea is more basic to our system than that government has no power to seize the property of some individuals in order to aid the private endeavors of others. *E.g., Citizens' Savings & Loan Association v. City of Topeka*, 87 U.S. (20 Wall.) 655, 663-64 (1875); *Cole v. City of La Grange*, 113 U.S. 1, 6 (1885); *United States v. Butler*, 297 U.S. 1, 61 (1936); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79-80 (1937). But the affront is exacerbated where, as here, the resources are "redistributed" from innocent public employees to an arm of a militant socio-political movement committed to wresting from the public whatever emoluments, special privileges, and extraordinary influence those monies can purchase from eager sellers in the political marketplace.

Indeed, it constitutes a singularly complex and critical violation, not only of the First and Fourteenth Amendments, *but even of the Constitution taken as a whole*. For the very legitimacy of our entire republican system rests upon the presumption that government will employ its legislative powers to provide and maintain a just framework within which all of the politically diverse elements in our society may compete, fairly and equally, for influence *not* to serve as a "collection agency" with the assistance of which

particular organized groups may advance at the expense of individuals to become the unwanted, unappointed, and unrepresentative, but nevertheless unremovable, arbiters of public policy. *Compare, e.g., Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring), *with Coppage v. Kansas*, 236 U.S. 1, 16-17 (1915). *See infra* pp. 164-76. The First Amendment is a particularly eloquent statement of this commitment to political equality in speech, association, or petition—a statement of the profound and permanent public interest in autonomy of thought, expression, and action where our most precious political freedoms are concerned. *Cf., e.g., Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion), *cited in NAACP v. Button*, 371 U.S. 415, 431 (1963); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Near v. Minnesota* ex rel. *Olson*, 283 U.S. 697, 719-20 (1931). The existence of that public interest is incompatible with any requirement that individual public employees such as the Teachers sacrifice their self-determination in political affairs for the benefit of any private association. The agency-shop scheme is such a requirement. Therefore, it is unconstitutional *per se*.

Because, as we have shown, the agency shop is unconstitutional *per se*, there is no compelling need to discuss the merits of any possible justifications for it. Nonetheless, in Part II.B., *infra* p. 115, we shall consider to what extent the Michigan Legislature and the Court of Appeals have put forward valid state interests in support of the scheme. Before we do, however, we wish to emphasize the highly specific nature of the constitutional conclusion which we have already drawn.

Our argument is based on the simple syllogism that: (i) For the state to require the Teachers as a condition of their employment to finance the Union's political and ideological activism infringes their freedoms under the First and Fourteenth Amendments. (ii) With respect to issues of First- and Fourteenth-Amendment autonomy, there is no difference between requiring the Teachers financially to support the Union and requiring them financially to support any other private organization. (iii) Therefore, the agency-shop requirement is unconstitutional on its face under the doctrine this Court enunciated in such cases as *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 379-80 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288 (1961); and *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960). We have, of course, also pointed to a set of decisions of the inferior federal courts which unanimously extend the reasoning of the *Pickering* line of cases to hold that a state cannot condition public employment upon *non*association with a labor union. And we have argued that, if these decisions are correct, then our position is constitutionally sound *a fortiori*. *Supra* pp. 34-40. But, while we take comfort in the added authority which the inferior federal courts bring in support of our claim, we need not and do not rely exclusively on the law of those cases *as it is colored by their peculiar factual assumptions*. In the final analysis, our argument depends only upon the general principles this Court established in such cases as *Pickering*, as applied to the record in this case.

We emphasize this because the decisions of the inferior federal courts extending the *Pickering* unconstitutional-conditions doctrine to protect union-membership in the public sector are premised on an assumption not yet definitively endorsed by this Court: namely, that for constitutional purposes there is no difference between a union and any other private association where government conditions employment on nonmembership. We do not believe that this can be an "absolute" of constitutional law. For we cannot imagine that a court true to its duty to protect our constitutional system could construe the First Amendment so as "absolutely" to protect public employees in forming and

joining unions *even when their actions were incompatible with the continued good order and proper functioning of government.* In the recent Hatch-Act cases, this Court held that the First Amendment does not guarantee federal or state employees *any* privilege to engage in partisan political activities inherently subversive of the ability of government to carry out its constitutional duties. *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 557, 564-66 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-18 (1973). The same could be said of the privilege to join and support a union inextricably involved in political and ideological activism. In light of the peculiarly political nature of public-sector unions, and the special responsibilities of government to insulate its employees from all political pressures antagonistic to the impartial and efficient administration of public services, denial of that privilege would certainly have a rational basis. *See Letter Carriers*, 413 U.S. at 564.

For this reason, we wish carefully to distinguish our position from one which overbroadly assimilates public-sector unions to other private associations. Contrary to the view of the inferior federal courts, we contend that public-sector unions *are* distinguishable from all other private associations on at least one crucial ground: namely, their participation in the inherently and immutably political collective-bargaining process. It is this participation, enhanced by their notorious political and ideological activism of both a partisan and non-partisan nature, which requires that they be classified as a species of political association *sui generis*. *See supra* pp. 62-80.

Therefore, even if this Court were in some future case to reject the assumptions of the inferior federal courts and their application of the *Pickering* doctrine to public-sector unionism, it could do so consistently with a decision for the Teachers here. Holding that a state may not constitutionally condition public employment upon membership in or

financial support of a labor organization, because the participation of a union in public-sector collective bargaining renders it an inherently political association, could in no way logically preclude this Court from holding that a state may condition public employment upon *non*membership in a labor organization because the partisan political activism of contemporary unions threatens seriously to undermine the stability of government. For the two statements are equally necessary implications of the same proposition: namely, that the First and Fourteenth Amendments do not guarantee public employees, as individuals or in an association, any "right" to engage in—*and certainly not with the cooperation of a state agency to compel dissenters to engage in*—political activity which is inimical either to the dissenters' freedom of self-determination or to the continued existence of good order and proper functioning in government. *See supra* pp. 21-80, *and infra* pp. 164-86.

B.

Neither the appellees, nor the Michigan Legislature, nor the Court of Appeals has put forward either a substantial or even a legitimate state interest in support of the agency-shop scheme.

We have already demonstrated that this case raises an issue of First- and Fourteenth-Amendment freedom which precludes application of the "balancing test", and that consideration of the character and essential effect of the PERA agency-shop scheme leads inexorably to the conclusion that it is unconstitutional *per se*. *See supra* pp. 83-99. In this subpart we shall show that, even if the "balancing test" were applicable here, the same constitutional result would obtain.

We may concede for purposes of brevity in argument that the State of Michigan possesses inherent power to regulate the public-employment relationship, and even that the exercise of this power should be accorded broad deference by the courts.

Nevertheless, this Court is not bound to accept the phrase "police power" as a talisman, immunizing from constitutional scrutiny any regulation which the active imaginations of artful advocates can bring within its ambit. *E.g., Panhandle Eastern Pipe Line Co. v. Highway Commission*, 294 U.S. 613, 619 (1935); *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U.S. 650, 661 (1885); *see United States v. Robel*, 389 U.S. 258, 263-64 (1967). Nor need we stand in awe of claims that the agency-shop is an essential element of an overriding "public policy" in Michigan. For, at best, the theory of "public policy" embodies a doctrine of vague and variable quality, subordinate, not superior, to constitutional limitations. *Patton v. United States*, 281 U.S. 276, 306 (1930). Since the PERA agency-shop scheme significantly infringes fundamental First- and Fourteenth-Amendment freedoms, mere assertions that the infringement is rationally related to the achievement of some hypothetical government purpose are not enough.

In Part II.B.1., *infra* p. 117, we shall establish that the appellees have failed to carry the burden of proof necessary to justify the PERA agency-shop scheme. In Part II.B.2., *infra* p. 120, we shall show that neither the Michigan Legislature nor the Court of Appeals has carried this burden, either—and that, indeed, the Court of Appeals has specifically held that the requirement of proof cannot be satisfied. And in Part II.B.3., *infra* p. 128, we shall consider extrinsic evidence bearing on the insubstantiality of Michigan's purported interest in the agency-shop. Later, in Part II.C., *infra* p. 147, we shall demonstrate that, rather than serving substantial and important governmental goals, the scheme actually works to frustrate three of the state's most compelling duties.

1.

Those supporting the agency-shop scheme have the burden of disproving its repugnance to the First and Fourteenth Amendments with clear and convincing evidence.

In some contexts, state regulation of individuals' liberties is constitutional under the Due Process Clause of the Fourteenth Amendment if it satisfies the *de minimis* "rational-basis test" alone. But the test of legislation which collides with the Fourteenth Amendment because it also affronts the principles of the First is much more rigorous and specific. For the character of First-Amendment freedoms, and their priority in our constitutional system, gives them a sanctity and a sanction not permitting dubious intrusions. Rather, since these freedoms form the very foundations of our democratic institutions, the presumption is strongly against any legislative interference with their exercise—and especially one which operates as a prior restraint. *Board of Education v. Barnette*, 319 U.S. 624, 639 (1943); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945); *United States v. CIO*, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne County*, 393 U.S. 175, 181 (1968); *DeGregory v. Attorney General*, 383 U.S. 825, 829 (1966); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama* ex. rel. *Patterson*, 357 U.S. 449, 463 (1958).

The appellees can rebut this presumption of unconstitutionality only by demonstrating that the PERA agency-shop serves a compelling government interest by the means least restrictive of the exercise of protected liberty. This requires that they show three things: First, that the scheme has a

substantial rational relation to some definitely specified, legitimate, and important state goal. No showing merely of a "rational basis" will suffice. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Gibson*, 372 U.S. at 546, 550-51; *NAACP v. Button*, 371 U.S. 415, 439-44 (1963); *Bates*, 361 U.S. at 525-27.

Secondly, they must demonstrate the "overriding" and "compelling" nature of the public interest they claim the scheme serves. While this Court has variously articulated the quality of the governmental interest necessary to justify infringements on First- and Fourteenth-Amendment freedoms, all its decisions have recognized that the regulated conduct or actions invariably posed some substantial threat to public safety, peace, or order—and that this threat was neither doubtful nor remote, but rather likely and imminent. Such a showing is the minimum demand of the Bill of Rights. *Gibson* 372 U.S. at 546; *Sherbert*, 374 U.S. at 403; *Thomas*, 323 U.S. at 530; *Bridges v. California*, 314 U.S. 252, 263 (1941).

Finally, the appellees must prove that the agency-shop scheme is necessary to achieve the compelling interest they have identified—in the sense that the law specifically bars only the conduct deemed obnoxious and is carefully drawn and narrowly aimed at that forbidden conduct alone. Even though a state government may have a purpose both legitimate and substantial in some regulation which infringes protected liberty, it may not constitutionally pursue its purpose by means that broadly stifle the exercise of basic freedoms if it can achieve the same end with less drastic means. In the area of fundamental First- and Fourteenth-Amendment liberties, governmental regulations must be highly selective, constitute sensitive tools, and operate only with narrow specificity and precision. *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring); *Shelton v. Tucker*, 364 U.S.

479, 485-90 (1960); *Louisiana* ex rel. *Gremillion v. NAACP*, 366 U.S. 293, 296 (1961); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Button*, 371 U.S. at 433, 438; *Talley v. California*, 362 U.S. 60, 64, 66-67 (1960) (opinion of the Court; Harlan, J., concurring); *Schneider v. Town of Irvington*, 308 U.S. 147, 162-64 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938); *see Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964); *United States v. Robel*, 389 U.S. 258, 264-68 & n.20 (1967).

Moreover, since First-Amendment liberties are involved, the appellees cannot prevail on a mere preponderance of the evidence, but must bring forward clear and convincing proof. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50-52 (1971) (opinion of Brennan, J.).

The record in this case is devoid of any such proof. Indeed, the Michigan courts did not even deign to require the Board or the Union to bring forward *any* factual matter, let alone a preponderance of the evidence or clear and convincing proof. Rather, the trial court dismissed the Teachers' complaints for failure to state a claim on which relief could be granted (A. 75-77)—in the teeth of both the presumption of unconstitutionality established in this Court's decisions, and the Michigan rule that on a motion to dismiss all factual allegations in the complaint are assumed to be true and viewed in the light most favorable to the plaintiffs. *E.g., Crowther v. Ross Chemical & Manufacturing Co.*, 42 Mich. App. 426, 429-31, 202 N.W.2d 577, 580 (1972). And the Court of Appeals affirmed—passing over not only the rules of pleading ignored by the trial court, but also the full implications of its own judicial notice of the partisan political activities of public-sector unions (A. 101), in its haste to dispose of this case on the groundless theory that the Teachers lacked "standing" to challenge the agency-shop scheme. *See* Part IV., *infra* p. 199. Moreover, while liberating appellees of any requirement to demonstrate that the scheme serves a compelling state interest in the manner least restrictive of free speech, association, and

petition, the Michigan courts denied the Teachers all opportunity either to challenge the courts' inarticulated and constitutionally impermissible assumption that it does, or even to introduce their own evidence disproving its rational basis, although that is their right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 204, 209-13 (1934).

The absence of these proofs decisively demonstrates that, even under the "balancing test", the agency-shop is unconstitutional on its face—because the interests it purportedly serves are not and cannot be classed as "compelling", and because it has already been adjudicated *not* to be the means least-restrictive of First- and Fourteenth-Amendment liberty to achieve the interests it does serve. To these considerations we now turn.

2.

Rather than constituting disproof of the unconstitutionality of the agency-shop scheme, the statements of the Michigan Legislature and the Court of Appeals establish its repugnance to the First and Fourteenth Amendments.

In the absence of a factual record, we must look elsewhere for some indication of what legitimate and substantial governmental interest the PERA agency-shop scheme might possibly serve. We cannot, however, permit our gaze to stray hither and yon even into the wild thicket of speculations which might be appropriate ground if this case were ruled by the "rational-basis" test. Rather, we must confine ourselves to the governmental purpose which the state has articulated and upon which it explicitly relies for justification of the agency-shop. *E.g., Bates v. City of Little Rock*, 361 U.S. 516, 525

(1960); *Schneider v. Town of Irvington*, 308 U.S. 147, 161 (1939). That purpose appears in PERA §10(2), as follows:

> (2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that *the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer*, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

Mich. Stat. Ann. §17.455(10)(2) (1975 rev.) (emphasis supplied).

We take as fully established that a declaration of this kind, setting forth a conclusion of constitutional law as to what constitutes the public interest, welfare, or necessity, is not binding on this Court. And we take as equally established the inconclusiveness of such a declaration in a case where, as here, serious infringements on fundamental constitutional liberties are in issue. *E.g., Block v. Hirsh*, 256 U.S. 135, 154 (1921); *Tyson & Brother v. Banton*, 273 U.S. 418, 431 (1927); *Everson v. Board of Education*, 330 U.S. 1, 52 (1947) (Rutledge, J., dissenting); *United States v. United States Steel Corp.*, 251 U.S. 417, 463 (1920) (Day, J., dissenting). But if, as a conclusion of law, the statement of §10(2) is without force, as a purported "finding" of fact it is without reason. Indeed, it is not a true "finding" at all, but a mere baseless conjecture as to the general effect of the agency-shop scheme upon the promotion of stability in public-sector labor relations. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935).

We should tax this Court's indulgence to no compelling purpose if we quoted at length from the tables of public-sector strikes, work-stoppages, and man-days lost prepared over the years by the United States Department of Labor. It

is enough to refer to the report "Work Stoppages in Government, 1974", prepared by the Bureau of Labor Statistics' Division of Industrial Relations, and reported in *GERR* Ref. File 71:1011 (Jun. 14, 1976). *See* Table 1 (facing page). For those who care to study them, these figures set out with mathematical clarity an empiric rebuttal of the notion that increased union activity in the public sector is a "stabilizing" influence on the administration of public services. They are, however, supererogatory. For the error inherent in the declaration of the Michigan Legislature is not one of complicated sums, percentages, or other statistics–but one of quite fundamental and simple logic. There can be no rational basis for the statement that "the stability and effectiveness of labor relations in the public sector require [the agency-shop]", because there is no rational basis for the implicit premise that the financial strength of public-employee unions is a factor which contributes to such stability.

We have already noted that collective bargaining in the public sector is designed to permit unions to influence, control, or override policy-judgments of public officials made through the normal political process. *Supra* pp. 103-05. Collective bargaining therefore presupposes that public-employee unions (or at least their leaders) frequently will be in disagreement with the representatives of society as to what terms and conditions of employment should be established in the public service. This, of course, is not accidental–considering that the collective-bargaining process is merely the embodiment in statute form of the philosophy of trade unionism, and that the philosophy of trade unionism posits the existence of a permanent struggle between employers and organized employees in which the central rôle of unions is to compel employers to grant ever-increasing economic concessions to their employees. *Cf., e.g., Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346 (1944); S. Perlman, *A Theory of the Labor Movement* (1928). But it does necessarily imply that *collective bargaining is a*

Table 1. Work stoppages by level of government, 1942-74

(Workers involved and days idle in thousands)

Year	Total[1]			Federal Government			State government			Local government		
	Number of stoppages	Workers involved	Days idle during year	Number of stoppages	Workers involved	Days idle during year	Number of stoppages	Workers involved	Days idle during year	Number of stoppages	Workers involved	Days idle during year
1942	———	———	———	———	———	———	———	———	———	39	6.0	23.7
1943	———	———	———	———	———	———	———	———	———	51	10.2	48.5
1944	———	———	———	———	———	———	2	0.4	8.0	34	5.3	57.7
1945	———	———	———	———	———	———	———	———	———	32	3.4	20.0
1946	———	———	———	———	———	———	1	(2)	(2)	61	9.6	51.0
1947	———	———	———	———	———	———	———	———	———	14	1.1	7.3
1948	———	———	———	———	———	———	———	———	———	25	1.4	8.8
1949	———	———	———	———	———	———	———	———	———	7	2.9	10.3
1950	———	———	———	———	———	———	———	———	———	28	4.0	32.7
1951	———	———	———	———	———	———	———	———	———	36	4.9	28.8
1952	———	———	———	———	———	———	———	———	———	49	8.1	33.4
1953	———	———	———	———	———	———	———	———	———	30	6.3	53.4
1954	———	———	———	———	———	———	1	(2)	.8	9	1.8	9.6
1955	———	———	———	———	———	———	1	.2	.5	16	1.3	6.7
1956	———	———	———	———	———	———	———	———	———	27	3.5	11.1
1957	———	———	———	———	———	———	———	———	———	12	.8	4.6
1958	15	1.7	7.5	-	-	-	1	(2)	(2)	14	1.7	7.4
1959	25	2.0	10.5	-	-	-	4	.4	1.6	21	1.6	57.2
1960	36	28.6	58.4	-	-	-	3	1.0	1.2	33	27.6	67.7
1961	28	6.6[4]	15.3	-	-	-	-	-	-	28	6.6	15.3
1962	28	31.1	79.1	5	4.6	33.8	2	1.7	2.3	23	25.3	43.1
1963	29	4.8	15.4	-	-	-	2	.3	2.2	27	4.6	67.7
1964	41	22.7	70.8	-	-	-	4	.3	3.2	37	22.5	57.7
1965	42	11.9	146.0	-	-	-	-	-	[3]1.3	42	11.9	145.0
1966	142	105.0	455.0	-	-	-	9	3.1	6.0	133	102.0	449.0
1967	181	132.0	1,250.0	-	-	-	12	4.7	16.3	169	127.0	1,230.0
1968	254	201.8	2,545.2	3	1.7	9.6	16	9.3	42.8	235	190.9	2,492.8
1969	411	160.0	745.7	2	.6	1.1	37	20.5	152.4	372	139.0	592.2
1970	412	333.5	2,023.2	3	155.8	648.3	23	8.8	44.6	386	168.9	1,330.5
1971	329	152.6	901.4	2	1.0	8.1	23	16.5	81.8	304	137.1	811.6
1972	375	142.1	1,257.3	-	-	-	40	27.4	273.7	335	114.7	983.5
1973	387	196.4	2,303.9	1	.5	4.6	29	12.3	133.0	357	183.7	2,166.3
1974	384	160.7	1,404.2	2	.5	1.4	34	24.7	86.4	348	135.4	1,316.3

[1] The Bureau of Labor Statistics has published data on strikes in government in its annual reports since 1942. Before that year, they had been included in a miscellaneous category — other nonmanufacturing industries. From 1942 through 1957, data refer only to strikes in administrative, protective, and sanitary services of government. Stoppages in establishments owned by governments were classified in their appropriate industry; for example, public schools and libraries were included in education services, not in government. Beginning in 1958, stoppages in such establishments were included under the government classification. Stoppages in publicly owned utilities, transportation, and schools were reclassified back to 1947 but a complete reclassification was not attempted. After 1957, dashes denote zeros.

[2] Fewer than 100.

[3] Idleness in 1965 resulted from 2 stoppages that began in 1964.

NOTE: Because of rounding, sums of individual items may not equal totals.

method for introducing and legitimating conflict in the administration of public services, and *not* a source of "stability and effectiveness" in labor relations.

As such, collective bargaining is fundamentally subversive of the symbiotic employer-employee relationship upon which the stability and effectiveness of public-sector labor relations depend. While public-employee unions can irresponsibly demand "more" and "still more" at the bargaining table (and, indeed, are driven to do so by the necessity of retaining their members), public employers must grapple with the economic and political problem of allocating limited resources to competing public needs. At some point, therefore, the employers must refuse to accede to the unions' demands. The process of collective bargaining thus inexorably casts the parties into antagonistic stereotypes from the perspective of public employees: the employers as close-fisted and unsympathetic masters, the unions as open-handed and concerned benefactors. And inexorably the employees tend increasingly to identify themselves with, and to attach their primary loyalties to, the unions as their protectors and protagonists. The agency-shop, of course, intensifies this tendency by effectively endorsing in law the notion that public employees owe the terms and conditions of their employment, not to the public employers who engage their services or to the taxpayers who provide their salaries, but to the unions who negotiate for them.

This Court has already recognized the perversity of such a result in its observation that each public employee owes his loyalty "directly, immediately, and entirely" to his government. "He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer." *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968). Here the Court need consider but a single further rhetorical question to conclude that the declaration of the Michigan Legislature is nonrational. Given the existence of a bargaining system premised upon economic

and political conflict between the parties; the participation in this system of private organizations the very survival, and certainly the success, of which are dependent upon conflict; the natural tendency of (and, in certain particulars, the legal necessity for) employees subordinated to these organizations through the exclusive-representation device to support them in any conflict with their employers; and the capacity of the agency-shop, not only to swell the organizations' treasuries, but also to coerce public employees into full membership—given all of these factors, could one draw any conclusion other than that Michigan has created a mechanism ill-suited for promoting labor "stability and effectiveness", but well-adapted for enhancing the likelihood and intensity of public-sector strikes, work-stoppages, and impasses? Certainly the logic of the system does not suggest that one could adduce clear and convincing proof of the contrary proposition.

On its face, then, PERA §10(2) provides no rational, let alone a substantial or compelling, basis for the agency-shop in public employment. Instead, it indicates that Michigan's commitment to the scheme promotes an obviously *illegitimate* purpose: namely, a delegation of sovereign power to private parties. *See infra* pp. 179-86. PERA §10(2) declares, we repeat, that

> the stability and effectiveness of labor relations in the public sector require, *if such requirement is negotiated with the public employer*, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee *which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.* [Emphasis supplied].

The section explicitly leaves to the Union the absolute discretion to negotiate, or not to negotiate, an agency-shop arrangement; to incur whatever expenses it deems appropriate in the collective-bargaining process; and then to "tax" these expenses, in whatever amount it desires (to a limit of

membership-dues), against the dissenting Teachers as a condition of their employment. The Michigan Legislature's "finding", therefore, amounts to the claim that the delegation to a private organization of arbitrary discretion to perform acts unlimited by any precise standards, unsupervised by any state agency, inconsistent with the maintenance of a proper employer-employee relationship, and incompatible with the Teachers' First- and Fourteenth-Amendment freedoms, is necessary to the public interest. Could anything more clearly demonstrate the absence of a compelling *public* interest than this total abdication of legislative authority to the discretion of public-sector unions? *Cf. supra* pp. 56-62.

We need not explain in detail how prior decisions of this Court foreclose the question of the unconstitutionality of such a delegation of power to private parties to structure the public interest according to their own. *E.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 318 (1936) (opinion of the Court; Hughes, C. J., concurring); *and cf. Lathrop v. Donohue*, 367 U.S. 820, 853-55, 878 n.1 (1961) (Harlan, J., concurring; Douglas, J., dissenting). Neither need we advert to the controlling nature of these decisions on the issue of exclusive representation which underlies the whole agency-shop problem. It is not our purpose to raise the constitutional conundrums which both Justices Harlan and Douglas in *Lathrop* considered pregnant with danger and difficulty even where the integrated bar, an arm of the state judiciary, is concerned. What we do urge upon this Court, though, is the realization that, in light of *Schechter* and *Carter*, the declaration of the Michigan Legislature impermissibly assumes that the kind of abdication which this Court has already declared to be a delegation of legislative power unknown to our law and an intolerable and unconstitutional interference with personal liberty, when enacted on a nationwide basis, may somehow be in the public interest in Michigan—and so much so, that it

justifies imposing political and ideological conformity upon the Teachers. Such an assumption cannot serve, in logic or law, as the basis for the agency-shop scheme.

Furthermore, even assuming *arguendo* that the Michigan Legislature had succeeded in identifying a legitimate and substantial state interest in the agency-shop, a finding of its unconstitutionality would not be foreclosed. For the Michigan Court of Appeals has already ruled that the scheme is not a means carefully tailored to achieve the purported goal of providing financial support for the Union's collective-bargaining activities, but instead permits the Union broadly to infringe the Teachers' First- and Fourteenth-Amendement liberties (A. 100-02).

We have established elsewhere that the Michigan Court's construction of the agency-shop scheme as permitting the Union to expend coerced "fees" for any purposes is definitive, and binding on this Court. *See* Jurisdictional Statement at 21 n.16. Here we need only emphasize that, having determined that the scheme abridges constitutionally guaranteed freedoms, the Court of Appeals has precluded *even the possibility* of appellees' satisfying the "least-restrictive-alternative" aspect of the "balancing test". And on that basis alone, it should have entered judgment for the Teachers. *See* Part IV., *infra* p. 199.

In sum, the declaration of the Michigan Legislature and the construction of PERA §10 by the Court of Appeals demonstrate the absence of any legitimate, let alone substantial, state interest in the agency-shop scheme. The state has no legitimate interest in compelling the Teachers, as a condition of their employment, to finance activities of a private organization which are inconsistent with the continued stability and effectiveness of public-sector labor relations. The state has no legitimate interest in delegating essentially unlimited and wholly unsupervised power to the Union to "tax" the Teachers for the privilege of serving their own government. The state has no legitimate interest in permitting the Union to

engage in wide-ranging prior restraints of the Teachers' freedoms not to speak, not to associate, and not to petition. And as we shall show in Part II.C., *infra* p. 147, the state has fundamental duties militating decisively against any scheme such as the agency-shop which promotes the latter illicit interests. Therefore, the scheme is unconstitutional on its face.

3.

The Teachers would pose no danger to the orderly and efficient provision of public services if their freedom to refuse to contribute financial support to the Union were recognized and protected.

The absence of any record evidence, legislative findings, or judicial statements in support of the PERA agency-shop scheme does not stand alone in its condemnation. Added support can be found in two other sources: (a) the pattern of labor relations generally prevailing in both the public and private sectors; and (b) the judicially mandated standards for determining whether public employees may be disciplined or discharged for speech or associational activities. Consideration of these matters establishes beyond peradventure that the Teachers would in no way threaten any interest the state has in the orderly and efficient provision of educational services to the City of Detroit if their freedom to refuse to contribute financial support to the Union were recognized and protected.

a. The vast majority of jurisdictions throughout the country consider the agency-shop so unimportant to the achievement of any compelling public interest that they disallow it altogether, or make it discretionary with the employer and union.

If the agency-shop were indeed *necessary* to achieve a compelling state interest of some sort in public-sector labor

relations, we should expect to find it the prevailing rule in most jurisdictions, as well as compulsory rather than (as in Michigan) discretionary with the public employer and union. To be sure, even if every state and the federal government had adopted the compulsory agency-shop, their actions would not foreclose the issue of its unconstitutionality; but their failure to do so would certainly speak eloquently as to the absence of an urgent public need for the scheme. For, after all, it would be callous of us to assume that legislatures throughout the nation are more out of touch with what the public interest requires than is Michigan's.

What, then, are the facts? Not congenial to the appellees' position, by any means. Less than one-third of the states—fifteen, to be exact—permit the agency- or union-shop in public employment. And of these, ten make it discretionary with the employer and union;[25] three make it discretionary with the union alone;[26] and only two make it mandatory.[27] More than two-thirds of the states,[28] and the federal govern-

[25] Alaska Stat. §23.40.110(b)(1-2) (1975) (union- and agency-shops); Cal. Gov't Code §3546 (West Supp. 1976) (teachers and other public-school employees); Ky. Rev. Stat. Ann. §345.050(1)(c) (Supp. 1974) (firemen) (union-shop); Mass. Gen. Laws Ann. ch. 150E, §12 (Supp. 1975); Mich. Stat. Ann. §17.455(10) (1975 rev.); Mont. Rev. Codes Ann. §59-1605(c) (Supp. 1976); Ore. Rev. Stat. §§ 243.666(1), 243.762(c) (1974); Vt. Stat. Ann. tit. 21, §§1722(a)(1), 1726(a)(8) (Supp. 1975) (union- and agency-shops); W. Va. Code Ann. §21-1A-4(a)(3) (rep. vol. 1973) (union-shop); Wis. Stat. §§111.70(1)(h), 111.70(2) (municipal employees), 111.81(6), 111.84(1)(f) (state employees) (1974).

[26] Hawaii Rev. Stat. §§89-3, 89-4 (Supp. 1976); Minn. Stat. Ann. §179.65, subd. 2 (Supp. 1976); Wash. Rev. Code §§28B.16.100 (teachers in higher education), 41.56.122 (public employees other than teachers) (Supp. 1975).

[27] Conn. Gen. Stat. Ann. §31-105(5) (1972); R.I. Gen. Laws Ann. §36-11-2 (Supp. 1975).

[28] *See* CCH Lab.L. Rep., State Laws ¶47,000 *et seq.*

ment,[29] make *no* provision for the agency-shop in their public-employment laws. Since a statutory authorization for the agency-shop which leaves its implementation to the caprice of the employer and union—or, worse yet, of the union *alone*—cannot as a matter of law, we submit, be said to subserve a *compelling* state interest,[30] we are left with but *two* states, Connecticut and Rhode Island, which have acted as logically as they should have if their legislators perceived an urgent need for the forced financial support of public-employee labor unions. Here, indeed, is a powerful case for the agency-shop—"as Maine goes, so goes Vermont"! And even if we concede *arguendo* that an agency-shop authorization left to exclusive union discretion generally amounts to a mandatory agency-shop, we amass no more than the staggering total of *five* states which demonstrate a full commitment to the concept of compulsory unionism for public servants. *Five states out of fifty*. Who, we are entitled to ask, is out of step with whom?

It is not impossible to conceive of these few states as blessed with a sensitivity to employment relations denied to the other nine-tenths of our nation and to Congress as its spokesman. But it is more realistic to attribute their eccentric actions, not to the probing insights of lawmakers, but to the political influence of lobbyists for the special-interest groups which stand particularly to gain from the agency shop: namely, public-employee unions. For, as we shall see in Part II.C.3., *infra* p. 164, the agency-shop is an instrument well and purposefully crafted to consolidate and strengthen the political position of these unions *vis-a-vis* society in general.

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[29] *See* Exec. Order 11,491, 5 U.S.C.A. §7301 (Supp. 1976).

[30] "Compel" is defined as "To drive or urge with force, or irresistibly; to constrain; oblige; necessitate, whether by physical or moral force * * *." *Webster's New Int'l Dictionary* 544 (2d ed. unabg. 1934). A state interest is hardly "compelling" in this sense of the term when its achievement can be left to the arbitrary and unsupervised whim of private parties.

"But", the appellees may retort, "this argument fails to emphasize that public-sector collective bargaining in general, and the agency-shop in particular, are relatively recent phenomena—and, as such, cannot be judged by merely counting the noses of their advocates." Very well then: let us consider two other points. First, history. Organized government has existed in this country since the early 1600's. Yet for over three hundred years, no one has considered the agency-shop necessary, desirable, *or even permissible* in the public service. Indeed, prior to the 1950's, public-employee unions themselves were generally banned as incompatible with the public interest in undivided loyalties among government workers. *E.g., Perez v. Board of Police Commissioners*, 78 Cal. App. 2d 638, 650-51, 178 P.2d 537, 545 (1947). And during this period, government seemed to function adequately—without, it should be noted in passing, constant interruptions by union strike-threat pressure financed in part with coerced agency-shop payments. *See infra* pp. 176-86.

A second point we might consider is that of policy. Even in the private sector, where unionism and collective bargaining have always been tolerated and (for the past fifty years) protected and fostered by statute, the law has never imposed the agency-shop or any other form of compulsory unionism. Both the Railway Labor and the National Labor Relations Acts *permit*, but do *not* require, employers and unions to negotiate agency-shop arrangements.[31] And the National Labor Relations Act specifically recognizes the continuing power of the individual states to ban all forms of compulsory unionism within their jurisdictions.[32]

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[31] Railway Labor Act §2, Eleventh, 45 U.S.C. §152, Eleventh (1970); National Labor Relations Act §8(a)(3), 29 U.S.C. §158(a)(3) (1970).

[32] National Labor Relations Act §14(b), 29 U.S.C. §164(b) (1970). These state "right-to-work" laws proscribing the agency-shop are catalogued *supra* pp. 106-07. The Railway Labor Act pre-empts "right-to-work" laws. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 231-32 (1956). *See* Part III., *infra* p. 191.

In short, the labor-relations laws of the public and private sectors refue any notion that the PERA agency-shop scheme serves a compelling public need.

b. Assertion of their First- and Fourteenth-Amendment freedoms through refusal to support the Union by the payment of agency-shop fees is not a legitimate basis for dismissal or discipline of the Teachers.

In *Pickering v. Board of Education*, this Court established the principle that public-school officials could not constitutionally dismiss a teacher from employment for the exercise of First- and Fourteenth-Amendment freedomes unless that exercise were shown, or could be presumed, either to have "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." 391 U.S. 563, 572-73 (1968) (footnote omitted). This holding was presaged and followed by numerous decisions of the inferior federal courts, a representative selection of which includes the following:

> [W]here the effect [of a state policy] is to impose, *without some concern for qualifications to teach*, the heavy burden of unemployment solely upon those whose constitutional rights were violated, * * * the application of the policy (although that policy is nondiscriminatory on its face and is based upon otherwise rational considerations) becomes impermissible.

Smith v. Board of Education, 365 F.2d 770, 780 (8th Cir. 1966) (Blackmun, J.).

> Any limitation on the exercise of constitutional rights can be justified only by a conclusion, *based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized*, whether the danger stems initially from the conduct of students or teachers.

James v. Board of Education, 461 F.2d 566, 571 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

> When a government employee asserts that his rights have been unconstitutionally infringed, it is necessary to strike a balance between the interests of the employee as a citizen and the interests of the government *in promoting the efficiency of the services it performs through its employees*. In striking that balance in the context of the First Amendment guarantee of freedom of speech, * * * *the standard of material and substantial interference is the standard to apply*.

Smith v. United States, 502 F.2d 512, 516-17 (5th Cir. 1974).

> Even if the exercise of a right protected by the first amendment were *only one of several reasons* for dismissal, the dismissal would be unlawful.

Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 573 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3622 (U.S. May 4, 1976).

> In the instant case, there was no suggestion *that [the teacher's] behavior resulted in any disruption of school activities, or that her behavior interfered with or denied the rights of the other teachers or students.*

Hanover v. Northrup, 325 F.Supp. 170, 173 (D. Conn. 1970).

> The school had *no power to curtail [the teacher's] freedom of association*, but did have the right not to rehire him at a point *where the exercise of his constitutional privileges overbalanced and outweighed his usefulness as an instructor.*

Jennings v. Meridian Municipal Separate School District, 337 F.Supp. 567, 571 n.2 (S.D. Miss. 1970), *aff'd*, 453 F.2d 413 (5th Cir. 1971).

> [T]he state has failed to show any *actual interference by [the teacher's] conduct with any interest of the state in its educational endeavors*. Not as much as a single student or teacher or administrator—or even townsperson—came forward with any evidence *that [the teacher's] associations had affected any relationship she had with any student, any teacher, or any administrator. Her effectiveness as a teacher, disciplinarian, or counselor stands without factual challenge. It is the lack of any factual, as contrasted with imagined or theoretical, connection between [the teacher's] association and a substantial weakening of the educational enterprise conducted by the board* * * * that must result in a finding that the termination * * * was not constitutionally justified.

Fisher v. Snyder, 346 F.Supp. 396, 401 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973).

> Free speech may create tumult; it may offend some of its hearers. * * * It may also create "staff anxiety." However, *staff anxiety over working with someone who is critical and outspoken, who adds to the dialogue that the First Amendment was designed to foster and protect, is no reason for firing a public employee for exercising her First Amendment rights.*

Pennsylvania ex rel. *Rafferty v. Philadelphia Psychiatric Center*, 356 F.Supp. 500, 508 (E.D. Pa. 1973).

> School authorities must nurture and protect, not extinguish and inhibit, the teacher's right to express his ideas. *Only if the exercise of these rights by the teacher materially and substantially impedes the teacher's proper performance of his daily duties in the classroom or disrupts the regular operation of the school* will a restriction * * * be tolerated.

Lusk v. Estes, 361 F.Supp. 653, 660 (N.D. Tex. 1973).

> [T]here is no justification for restricting the right of a teacher to engage in nonpartisan advocacy of social or political reform, *absent a showing that such activity reflects substantially on his or her performance in class or interferes with the regular operation of the schools.*

Alabama Education Association v. Wallace, 362 F.Supp. 682, 685-86 (M.D. Ala. 1973). (Emphasis supplied throughout.)

Pickering also established that the burden of proof in such a case rests with the employer, a position followed unanimously by the lower courts. 391 U.S. at 574; *Smith*, 502 F.2d at 517 ("incumbent upon [government] to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of [his] duties and responsibilities"); *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 572-73 (7th Cir. 1972) (Stevens, J.), *cert. denied*, 410 U.S. 928, 943 (1973); *James*, 461 F.2d at 572; *Smith v. Losee*, 485 F.2d 334, 339-40 (10th Cir. 1973) (burden on state to adduce "clear and convincing evidence"), *cert. denied*, 417 U.S. 908 (1974); *Doherty v. Wilson*, 356 F.Supp. 35, 41 (M.D. Ga. 1973) (evidence must establish "cause to believe that the [teacher] intended to use a teaching position as a front for promoting disruptive activity, * * * or for undue proselytizing"); *Frain v. Baron*, 307 F.Supp. 27, 31-32 (E.D.N.Y. 1969); *see Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509, 514 (1969); *contrast Bishop v. Wood*, 44 U.S.L.W. 4820, 4823 (U.S. Jun. 10, 1976) (where no claim "that the public employer was motivated by desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, [Court] must presume that official action was regular").

An even more striking application of this aspect of the unconstitutional-conditions doctrine is the decision in *Baird v. State Bar*, where this Court held that, absent a record which tends to show that an applicant is "not morally and professionally fit to serve honorably and well as a member of the legal profession", failure by the state to process her application and admit her to the bar because of her refusal to answer a question concerning possible subversive beliefs and associations is unconstitutional under the First and Fourteenth Amendments. 401 U.S. 1, 8 (1971).

The principles of *Pickering*, *Baird*, and similar cases control this appeal, and render frivolous any contention that the agency-shop scheme, as a condition of employment, is not repugnant on its face to those Amendments. Let us consider the record in the light of these principles. Is it a record which is deficient because it substitutes abstractions for facts, and imagined or theoretical connections between the Teachers' conduct and a disruption of the educational process for a demonstrated nexus? No–*it is a record which does not rise even to that substandard level*, a record barren of a single scintilla of evidence, abstract or concrete, imagined or perceived, theoretical or empirical. It is a record devoid of any hint that the Teachers' refusal to associate with the Union through the compulsory payment of fees renders them morally or professionally unfit to fulfill their duties; impairs or destroys their effectiveness as instructors, disciplinarians, or counselors; jeopardizes their abilities to contribute to a program of sound public education; materially and substantially interferes with the discharge of their duties and responsibilities; adversely affects school discipline or disrupts school activities; or serves as a mere front for undue proselytizing. In short, it is a record which, if it supports the judgment of the Michigan Court of Appeals, must implicitly enunciate the novel and startling proposition that *mere nonunionism in and of itself overbalances and outweighs any individual's usefulness as an instructor in the Detroit public schools. Or, that the acid test of an individual's competence for public employment in education is his willingness to finance a private organization unrelated to the educational process except through its own claim to control the employment relations of dissenting teachers.*

The absence of a record linking the agency-shop to the Teachers' competence as instructors, however, is certainly in keeping with the construction given PERA §10 by the Michigan Court of Appeals, and the necessary operation of that provision. For, in effect, the Michigan Court has held

that the agency-shop serves as a front through which *the Union* can coerce financial support from the Teachers for its own political and ideological activism–activism designed precisely to control the educational process in the Detroit schools. Moreover, it is through the agency-shop scheme that *the Union* threatens to destroy the Teachers' effectiveness as instructors by denying them an equality of opportunity to render public service and to contribute their own unique talents to a program of sound public education in the city. And it is the agency-shop scheme, as we have shown, which operates in favor of *the Union* to undermine the loyalties of all nonunion teachers "to support [their] superiors in attaining the generally accepted goals of education." *Pickering*, 391 U.S. at 568.

If, therefore, as this Court held in *Pickering*, the First and Fourteenth Amendments guarantee teachers the liberty *to criticize* a school board to which they owe professional duties and responsibilities, it follows *a fortiori* that the Teachers have an equivalent liberty to refuse to accede to demands asserted by the Union (and enforced by the Board) that they finance a process of collective bargaining and various partisan political activities which they believe are inimical, not only to their own interests as educators, but also to the interests of the Board as their employer and of the public as the ultimate beneficiary of the trust they are honor-bound to promote (*see* A. 12-13, 26-27, 49).

We are not, of course, unmindful of the argument that, if the Teachers and others like them are permitted to refrain from financing the Union, public education in the city of Detroit might suffer "labor unrest". Unfortunately, it is on the basis of such vague speculations, ungrounded in concrete factual findings linking specific conduct of the Teachers to particular episodes of disruption in the Detroit schools, that both the Michigan Legislature and the Court of Appeals have brought us to the sorry state of affairs which forms the predicate for this appeal. For that reason, we might be

tempted simply to disregard the claim as unsubstantiated in the record—to point out, in short, that there is no history of "instability" in public-sector labor relations attributable to the absence of agency-shop arrangements; that, if anything, the logic of collective bargaining indicates that the agency-shop aids the Union to promote and capitalize on unrest among public employees; and that, in any event, the "danger" to which appellees ultimately point is precisely the "danger" to which the First Amendment extends its protection: namely, diversity of views, "free and fearless reasoning and communication of ideas to discover and spread political * * * truth." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Moreover, should we embark upon that easy course, we could rely with confidence on the holding of this Court in *Pickering* that mere allegations that the exercise of First-Amendment freedoms "would foment controversy and conflict among the Board, teachers, adminstrators, and the residents of the district" cannot justify suppression of that exercise, absent convincing evidence in support of the charges. 391 U.S. at 570. Considering the fundamental importance of this case, however, we cannot choose the easy course. We cannot close our eyes, and we urge this Court not to blind itself, to what the "labor-unrest" argument really means in terms of the power relationships in contemporary public-sector employment. *Cf. NAACP v. Button*, 371 U.S. 415, 435 (1963), *cited in Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963); *NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449, 452, 464-65 (1958). For it is the substance of this "labor-peace" argument which exposes the true character of the agency-shop scheme as a naked assault upon the Teachers' fundamental freedoms of speech, association, petition, and self-determination.

Bluntly put, the "labor-peace" argument is a euphemism for extortion, a circumlocution for the threat that the Union will undertake to interfere with the provision of educational services if public officials (and, ultimately, the courts) do not

aid and abet it in compelling political and ideological conformity in the Detroit schools. It is, in short, an attempt to raise the rationale of the "protection racket" to the level of a rule of constitutional law. We must therefore admit that recognition of the Teachers' First- and Fourteenth-Amendment freedoms in this case may in a certain way pose a potential danger to the public interest. But we must also immediately add that it is a threat to the public interest which arises (if at all) from activity *of the Union*, not from any conduct of the Teachers which the state may constitutionally suppress, or the suppression of which this Court should condone.

Although in narrowly defined circumstances government may limit or proscribe the exercise of speech to prevent the speaker from intentionally provoking a given group to hostile reaction, the mere possibility that persons with lawless and violent proclivities may attempt physically to censor First-Amendment activity provides no legitimate reason for the state to effectuate that censorship itself in the name of "peace" or "order". That the exercise of First-Amendment freedoms may often be annoying or even offensive to some is no constitutional ground to deny those freedoms. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. * * * But our Constitution says we must take this risk * * *." *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 508 (1969); *accord, Cohen v. California*, 403 U.S. 15, 20, 23 (1971); *Terminiello v. City of Chicago*, 337 U.S. 1, 2-3 (1948); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *Cox v. Louisiana*, 379 U.S. 536, 550-51 (1965); *contrast Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

Moreover, what government may not deny to satisfy the intolerance of private parties it may not make the subject of direct state censorship, either. "[T]he curtailing of expression

which [government officials] find abhorrent or offensive cannot provide the important governmental interest upon which impairment of First Amendment freedoms must be predicated." *Gay Students Organization v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974), *citing Papish v. Board of Curators*, 410 U.S. 667, 670 (1973); *Healy v. James*, 408 U.S. 169, 187-88 (1972).

And just as an individual's freedoms *to* speak, associate, and petition are not contingent upon the willingness of others to refrain from threats, harassment, and violence, so too are his freedoms *not* to speak, associate, or petition independent of the wills and demands of others. *See supra* pp. 40-46. For if the First and Fourteenth Amendments entitle each citizen to voice controversial ideas, they entitle no citizen, as an individual or in an association, to force his ideas and opinions on his neighbors. *See Gray v. Union County Intermediate Education District*, 520 F.2d 803, 807 (9th Cir. 1975). Under our Constitution , unity of opinion is to be fostered by persuasion, not by persecution.

Nor may government effect a coerced consensus—even in the name of such basic interests as national unity. In *Board of Education v. Barnette*, Mr. Justice Jackson reminded us that the diversity of views which the First and Fourteenth Amendments guarantee is the very life-blood of our society, and that any attempt to drain it away can have none but fatal consequences for our freedom:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. * * * As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. * * * Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

319 U.S. 624, 640-41 (1943).

If we emphasize what should appear as elementary propositions of constitutional jurisprudence, it is because their message has not yet penetrated to those who support the agency-shop as a means of achieving "labor peace". Public employees, such as the Teachers, who dissent from compulsory-unionism arrangements themselves constitute no grave and immediate danger to the stability and effectiveness of public-sector labor relations. What poses a real and serious threat is the intolerance of union leaders and their misguided adherents, who all too often resort to harassment, intimidation, and even physical violence to attempt to coerce the "solidarity" among employees which they cannot bring about through peaceful persuasion and argument. It is union leaders, characteristically, who harass and incite animosities against nonunion employees—especially in situations where applicable law precludes agency-shop or other compulsory-unionism arrangements. *See, e.g., Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 266-68 (1974). And the Union has engaged in such activity here.[33] For public employees, such as the

[33]One of the *Abood* plaintiffs described typical incidents in an affidavit filed with the Michigan Court of Appeals:

> I have been subjected to other forms of harassment by the DFT. In November of 1973 the plastic name strip on my school mailbox was removed, and replaced with a name sticker which read "BARB SCAB." I removed this plastic strip and sent it to the principal's office, with a message that I did not feel that this type of action was appropriate for the union to undertake in the schools. I received no response from the principal. * * * A second identical strip was later placed on my mailbox.
>
> Additionally, I received in my school mailbox a student grade form filled out as follows * * *: "PEDERSON has completed SCAB I with a mark of A * * *." Again on May 28, 1974, I received through my school mailbox a paper that read as follows: "Cost of living getting you down? Your 1973 W-2 statement somewhat shocking The following teachers found a partial solution – Work during a strike!" Fifteen teachers' names were included on that list, including mine.

R., Affidavit of Barbara H. Pederson, *attachment to* Objection to Appellees' Application for Rehearing or Clarification (Mich. Cir. Ct., Apr. 28, 1975).

Teachers, who see the duties they owe to government and to society as incompatible with blind allegiance to any private organization, frustrate the unions' goal to coerce economic and political concessions from the state by interfering with the provision of public services.[34] For that reason, intimida-

[34]In their respective complaints, the Teachers alleged that

> collective bargaining in public employment in Michigan has disadvantages which outweigh its advantages to individuals embraced within the bargaining unit, and to the public at large, particularly with reference to teachers and to Plaintiffs, among such disadvantages being * * * [s]trikes called, sponsored and encouraged in violation of law.

(A. 12, 49.) The Teachers offered to prove the above allegation as part of their opposition to appellees' first motion to dismiss (A. 21). They supported that offer with accompanying affidavits. *E.g.*, Affidavit of Charles A. Benson at 4-5 (A. 26-27):

> I do not believe that teachers should strike in violation of law. Yet the Detroit Federation of Teachers has struck in the past and doubtless will threaten to strike in the future. It is the official policy of the American Federation of Teachers to endorse teachers' strikes and to work for the removal of legislation prohibiting strikes. Strikes by teachers are on the increase. I think this is detrimental to the teaching profession, and will in time also impose an economic hardship on many teachers who are forced to remain out of work during a strike, against their will. In addition, teachers' strikes as endorsed by the Federation, are highly detrimental to education, the community as a whole, and the children in the public schools.

The truncated record in this case as yet contains no evidence of strikes instigated or encouraged by the Union. But reported decisions in other cases show that the Union has been involved in strikes, along with other Michigan affiliates of the American Federation of Teachers. Board of Educ. v. Detroit Fed'n of Teachers, 55 Mich. App. 499, 223 N.W.2d 23 (1974); Stillwell v. Detroit Fed'n of Teachers, 88 L.R.R.M. 2266 (Mich. Cir. Ct., Wayne Cty., 1974); Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College, 518 F.2d 1091 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3351 (U.S. Nov. 12, 1975) (No. 75-698); Board of Educ. v. Taylor Fed'n of Teachers, 66 Mich. App. 695, 239 N.W.2d 713 (1976). The Michigan PERA, of course, prohibits strikes by public employees, including teachers. Mich. Stat. Ann. §17.455(2) (1975 rev.).

tion and violence aimed at nonunion employees are not foreign to public-sector "labor disputes":

> Often a proportion of the employees in the bargaining unit will cross the union's picket lines. *Their efforts will release the pressure on supervisory personnel and will broaden the range of services that can be continued. By breaking ranks with the union, these employees expose themselves to personal attacks by union adherents. During the strike, extra precautions must be taken to protect the employees' property, homes and families. Where union picketers are violent, this protection may extend to the provision of food and bedding at the job site. After the strike, it may be necessary to separate these employees from the strikers so as to avoid harassment and confrontation.*

Mulcahy & Schweppe, "Strikes, Picketing and Job Actions by Public Employees", 59 *Marq. L. Rev.* 113, 130 (1976) (emphasis supplied). And the Union has engaged in such activity here.[35] This, then, is the true import of the "labor-peace" argument: First, that public employees whose personal beliefs cause them to eschew associations with unions, or who seek diligently to perform their tasks as public servants in the face of union demands to desist, thereby expose their persons, their property, their homes, and their families to retaliatory confrontations, harassment, and outright attacks at the hands of union partisans. And secondly, that *therefore* they should be compelled by legislature and courts to surrender *in addition* their freedoms of speech, association, petition, and employment to control by those same unions.

[35]One of the *Warczak* plaintiffs described a typical incident in an affidavit filed with the Michigan Court of Appeals:

> Again in late 1973, I received notices from the DFT that I would have to pay either dues or fees in order to keep my job. At about the same time, the DFT representative in Fleming Elementary said to me, "We'll see that you lose your job," because I had worked during the DFT's illegal strike in September, 1973.

R., Affidavit of Beverly De Mers Pearsall, *attachment to* Objection to Appellees' Application for Rehearing or Clarification (Mich. Cir. Ct., Apr. 28, 1975).

If we were to take this sophistry seriously, we might suggest several decisive rejoinders. For instance, to the assertion that "labor peace" should weigh more heavily on the constitutional scales than dissenters' First- and Fourteenth-Amendment freedoms, we could respond that the Michigan Court of Appeals has already determined that "freedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded", even against the "countervailing" Michigan policy of "labor stability" (A. 102). Or, to the assertion that, without compelled conformity, the example of dissenting teachers will encourage other employees to withdraw from union affiliation and support—thereby causing "fragmentation" and undermining union strength, we could respond that a union has no claim in reason or law to stifle dissent simply because that dissent may be effective. "[T]he group in power at any moment may not impose * * * sanctions on peaceful [exercises of First- and Fourteenth-Amendment freedoms] merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Thornhill v Alabama*, 310 U.S. 88, 104 (1940). Or, to the assertion that the right to dissent must be "balanced" against the " 'competing right' to join effective unions", we could respond that "the rights of [dissenting] employees to work for whom they will, and, undisturbed by annoying importunity or intimidation of numbers, to go freely to and from their place of labor", and "the right of the employer * * * to free access of such employees", are "primary"—and even more so in the public sector than in the private. *American Steel Foundries v. Tri-City C.T. Council*, 257 U.S. 184, 206 (1921). But to prepare a catalogue of such detailed counter-arguments would be to bring owls to Athens. For long ago John Locke, the spiritual father of our Constitution, exploded the notion that those who exercise their liberties in the face of suppression, and defend them against aggression, somehow endanger "peace". "They may as well say upon the same ground", he argued,

> that honest Men may not oppose Robbers or Pirates, because this may occasion disorder or bloodshed. If any *mischief* come in such Cases, it is not *to be charged* upon him, who defends his own right, but *on him*, that *invades* his Neighbours. If the innocent honest Man must quietly quit all he has for Peace sake, to him who will lay violent hands upon it, I desire it may be consider'd, what kind of a Peace there will be in the World, which consists only in Violence and Rapine; and which is to maintain'd only for the benefit of Robbers and Oppressors.

Second Treatise on Government §228 (P. Laslett ed. 1960).

Many conflicts exist in our society, among which those generated by the attempt of union leaders to coerce political conformity among public-sector employees is not the most severe. But in controversial matters of public-employee unions and unionism, no less than in matters of interracial antagonism, the state cannot legitimately promote preservation of the public peace by depriving innocent citizens of their constitutional rights and privileges. Government cannot legitimately deny constitutional rights—to minority races or to nonunion teachers—simply because of hostility to their assertion or exercise. *E.g., Buchanan v. Warley*, 245 U.S. 60, 80-81 (1917); *Watson v. City of Memphis*, 373 U.S. 526, 535-36 (1963).

Finally, our refutation of the "labor-peace" argument provides an appropriate context in which to point out a fundamental distinction between this case and *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), the decision upon which both the Michigan Court of Appeals and the appellees erroneously rely, and which we shall discuss at length in Part III., *infra* p. 187. In *Hanson*, this Court held that securing "industrial peace" along the arteries of commerce is a legitimate object of the federal government, and that the choice by Congress to permit railway employers and unions to enter into limited union-shop arrangements is not without a rational basis. 351 U.S. at 233-34. *Hanson*, of course, dealt with employment in the *private* sector, where national labor policy recognizes the privileges of both em-

ployers and unions to employ economic coercion as a weapon in the bargaining process. *E.g., American Ship Building Co. v. NLRB*, 380 U.S. 300, 317-18 (1965); *NLRB v. Insurance Agents*, 361 U.S. 477, 488-89 (1960). In that context, where the economic struggle is a wholly private affair, there may be a rational basis in the belief that permitting the parties voluntarily to enter into union-shop arrangements, *not unlike those into which they might have entered at common law*, could tend to stabilize industrial relations. *See supra* pp. 13-15. Such is not the case in the *public* sector, however. For in the public sector, "labor strife" is, not merely an economic struggle between private parties, but *an economic and political conflict between society, on the one hand, and public-sector unions, on the other*. Public-policy decisions, to be sure, may rest upon many grounds. *But the very nature of government requires above all else that threats by private groups be absolutely excluded from the catalogue of reasons that the state may advance in support of legislation which peculiarly benefits those groups at the expense of other segments of society*. Indeed, political extortion is not only a nonrational basis for governmental action, but also a compelling reason for voiding that action on the most fundamental possible grounds: namely, that no government can demand the obedience of any man to laws dictated by private parties to whom he owes no allegiance and from whom he can expect no protection.

The reasoning of *Hanson* on the issue of "labor peace", therefore, is irrelevant in the public sector. Indeed, where First-Amendment freedoms are at stake (as they were *not* in *Hanson*), that decision would be irrelevant even in the private sector. Suppose, for example, that, in order to suppress articles in the public press critical of certain powerful trade unions, the unions engaged in nationwide strikes, threatening to throttle the country's economy until Congress should forbid the publication of such articles. Would anyone contend, on the basis of *Hanson*, that this court might uphold

congressional power so to censor the press on the theory that such censorship has a rational basis—or even that this Court might find the interference with interstate commerce so occasioned by the unions a compelling governmental interest justifying prohibition of the provocative articles? Obviously not. *Cf. Terminiello v. City of Chicago*, 337 U.S. 1 (1949). It hardly seems, then, that we should expect a different result where "labor unrest" is directed, in the first instance, to compelling government to make concessions, not at the expense of one group, but at the expense of society in general.

C.

On its face, the agency-shop scheme is an overbroad extension of the exclusive-representation device which enhances the ability of the Union to suppress the Teachers' academic freedom, to exercise disproportionate political power at the expense of all other citizens, and to usurp prerogatives of sovereignty from the state.

We have already presented what, under normal circumstances, would be a more than sufficient case for the unconstitutionality of the PERA agency-shop scheme. On the one hand, we have shown that it is a direct attack on the Teachers' political and ideological autonomy, in the form of a prior restraint on "positive" and "negative" First- and Fourteenth-Amendment freedoms—and is therefore unconstitutional *per se*. *Supra* pp. 85-99. On the other hand, we have shown that, even if the "balancing test" were applicable here, the agency-shop is nevertheless unconstitutional on its face—since it serves neither a compelling nor an important nor even a legitimate state interest, and has already been adjudicated by the Michigan Court of Appeals to be an overbroad infringement on freedom of speech. *Supra* pp. 115-28. We believe, however, that the constitutional issues raised in this appeal are so fraught with significance that we cannot content ourselves with, nor limit this Court's purview to, what would be an adequate argument in the normal run of cases. Therefore, in this subpart we shall go further, and examine what we

assert are compelling public interests which militate *against* the agency-shop scheme, and foreclose any serious debate on its repugnance to our Constitution.

Our analysis shall focus on three particular consequences of the agency-shop in the system of compulsory collective bargaining to which it is an adjunct. In Part II.C.2, *infra* p. 153, we shall show that the scheme is incompatible with the Teachers' professional sovereignty, or academic freedom, which lies at the very heart of our educational system. In Part II.C.3, *infra* p. 164, we shall show that it is equally incompatible with popular sovereignty, or representative government, which lies at the heart of our constitutional system. And in Part II.C.4, *infra* p. 176, we shall show that it is even incompatible with governmental sovereignty, without which an ordered, let alone a free, society cannot long survive.

Our purposes in these subparts will not be to argue once again that the appellees have failed to justify the agency-shop scheme under the "balancing test". We have already won that argument. *Supra* pp. 115-28. Here we shall explain how the agency-shop constitutes an overbroad extension of the exclusive-representation device, an extension fundamentally incompatible with the public interest. This appeal, of course, does not raise the question of the unconstitutionality of exclusive representation in public employment. Therefore, we must and shall refrain from addressing the merits of that issue, secure in the knowledge that they will wend their tortuous way to this Court, sooner or later. But, while refraining from a direct attack on exclusive representation, we are none the less compelled to draw that purely statutory device into our constitutional analysis. For the Michigan Legislature has based such meagre justification as it has advanced for the agency-shop on the notion that the scheme is necessary to compel all employees to "share fairly in the financial support of their exclusive bargaining representative". PERA §10(2), Mich. Stat. Ann. §17.455(10)(2) (1975 rev.).

What we shall urge upon this Court is the necessity of its scrutinizing with care the consequences of pursuing the implications of the exclusive-representation device as single-

mindedly and relentlessly as has Michigan in the PERA agency-shop scheme. In effect, *Michigan has elevated a purely statutory and constitutionally doubtful device above the most highly prized and jealously guarded of all constitutional principles: individual autonomy in political thought and action*. And whatever the place of the exclusive-representation device in our society, it cannot justify this result—not only because the immediate effect of the agency-shop is to abridge the Teachers' First- and Fourteenth-Amendment freedoms, but also because the ultimate erosion of constitutional values of which it is a part will wash away academic freedom entirely and seriously undermine popular and governmental sovereignty.

As we shall show, these are not idle fears. If the logic of exclusive representation can be extended, through the agency-shop, to stifle the Teachers' freedoms of speech, association, and petition while compelling them to finance their own induction into the "goose-stepping brigades" of political conformists foreseen by Mr. Justice Douglas in *Lathrop*,[36] then the already enormous and overweening political power of public-sector unions cannot but significantly increase—at the expense of an electorate already in a position of political disadvantage *vis-a-vis* these unions. *Infra* p. 164. In short, to countenance the relentless pursuit of the implications of the majority-rule device evidenced by the PERA agency-shop scheme is to expose popular sovereignty in this country to a peril outside of its experience and perhaps beyond its capacity to resist.

We repeat: Our concern here is *not* to attack the principle of exclusive representation as such. Our concern is to warn this Court against the consequences of Michigan's undiscriminating and remorseless pursuit of that principle, and to demonstrate how such a pursuit, if permitted (as the appellees urge) to extinguish whatever constitutional freedoms may "get

[36] 367 U.S. at 884-85 (dissenting opinion).

in the way", will destroy not only the basic liberties of dissenting public employees but also the fundamental structure of the American polity. Our concern is to point out that, if any compelling public interest exists in respect of the agency-shop, it is the interest in protecting the privilege of the Teachers to refrain from financing the Union's political ambitions. *This* interest *is* conformable to and congruent with all other public interests, especially the interest in preserving popular sovereignty. And it can be served, if the Teachers' challenge to the agency-shop is upheld here, merely by restraining an unnecessary extension of the exclusive-representation device. This case therefore presents a rare jurisprudential "bargain" in the accommodation of public policy to fundamental constitutional principles. For the Court can provide invaluable protections to popular sovereignty and individual liberty at the cost of only an incidental and unimportant limitation of the majority-rule scheme.

Before we begin discussion of these matters, however, we should establish the necessary context by amplifying an important point heretofore only adumbrated: to wit, the nature of compulsory collective bargaining under the Michigan PERA. And to that we now turn.

1.

Even without the agency-shop, compulsory public-sector collective bargaining permits unions acting as exclusive representatives to exercise extraordinary authority over public employees and extraordinary influence upon the formulation of public-employment policy.

Especially in the public sector, there is a critical difference between voluntary and compulsory collective bargaining. The essence of the distinction is to be found in the dichotomy between freedom and coercion—between doing what one

wishes to do and doing what one is *forced* to do. Free collective bargaining involves negotiations between willing parties on both sides: employees who freely appoint agents to bargain for them; and employers who prefer to bargain with those agents rather than with the employees as individuals. Free collective bargaining was always an option for employers and employees at common law; and, interestingly enough, had not this Court later overruled the statutory construction on the basis of which it originally upheld the constitutionality of the Railway Labor and National Labor Relations Acts, it would have been essentially the rule under statutory private-sector collective bargaining as well. *See Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 252-54 (1917); *compare Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548-49, 557-59 (1937), *and NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-46 (1937), *with Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346-47 (1944), *and J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-39 (1944).

Compulsory collective bargaining, conversely, involves two components unknown at common law—one relating primarily to employees, the other to employers. With respect to employees, such as the Teachers, the central characteristic of compulsory collective bargaining is the majority-rule principle, enforced through the device of exclusive representation. Having been designated by a majority of employees in an appropriate bargaining unit, the Union is the *exclusive representative* for *all* employees in the unit, whether they voted in its favor, against it, or not at all. Mich. Stat. Ann. §17.455(11) (1975 rev.). As their exclusive representative, the Union plays a dominant and controlling role in the Teachers' employment destinies, both as regards determination of the terms and conditions of their employment and as regards the prosecution of their employment grievances. So great, indeed, is the power of exclusive representatives over employees, that unions granted this status have frequently been called "gov-

ernments", even by those who favor compulsory collective bargaining. Professor Clyde Summers, for example, had this to say of a union exercising the powers of an exclusive representative:

> A union, in bargaining, acts as the representative of all workers within an industrial area. It weighs alternatives and determines policies which vitally affect all those whom it represents. It negotiates a contract which becomes the basic law of that industrial community. In making these laws, the union acts as the worker's economic legislature. After the laws have been made, the union is charged with their enforcement, and through its grievance procedure helps judge their interpretation and application. It is the worker's policeman and judge. *The union is, in short, the employee's economic government. The union's power is the power to govern.*

"Union Powers and Workers' Rights," 49 *Mich. L. Rev.* 805, 815-16 (1951) (emphasis supplied).

Although we shall discuss the point in more detail hereafter, it would not be premature to note at this juncture some of the practical and conceptual difficulties that inhere in the characterization of exclusive representatives which Professor Summers has presented. Political government in operation is not a mere abstraction. It is a set of daily tasks, performed by human beings, which (on the whole) are thought vital to the very existence of an ordered and free society. If those human beings employed by government for the performance of its critical functions are subjected—compulsorily—to *another* "government", *another* "sovereign" (as Professor Summers suggests they are), then there must arise a condition of disorder pregnant with the potential for chaos. *See infra* pp. 176-86.

With respect to employers, the central characteristic of compulsory collective bargaining is an *enforceable* duty to bargain—which means, simply, that the appellee Board is pushed, virtually compelled, to arrive at an agreement with the Union with respect to all terms and conditions of the

Teachers' employment. *See* Mich. Stat. Ann. §17.455(15) (1975 rev.). Employment rules may not come from the Board's unilateral decisions; nor from civil-service rules made by governmental agencies pursuant to laws enacted by the state legislature; nor from bilateral negotiations between the Board and the Teachers. The "legislation" governing terms and conditions of employment, as Professor Summers points out, must be the product of two *concurrent authorities:* the Board *and the Union.*

This, then, is the set of institutions which make up compulsory public-sector collective bargaining. Having established this context, we are now prepared to expose the effect of the agency-shop on academic freedom, representative government, and (ultimately) governmental sovereignty itself.

2.

As an instrument for compelling political and ideological conformity among teachers, the agency-shop is incompatible with academic freedom.

If this case has a unique aspect, it is that the unconstitutional agency-shop requirement in issue here is directed at public-school *teachers*—who, we submit, occupy a special place, not only in our society, but also in the favor of the First and Fourteenth Amendments. It is appropriate, therefore, to begin discussion of the compelling public interests against the agency-shop scheme by presenting our position on these special matters. Briefly put, it is this: The commitment of our society to public education makes protection of the values inherent in academic freedom one of the state's most compelling duties. Permitting school officials to coöperate with organizations such as the appellee Union in imposing political and ideological conformity on dissenting teachers, however, is incompatible with the fulfillment of this duty.

And for that reason, there is a compelling public interest against the PERA agency-shop scheme. We shall focus our argument on two points: (a) This Court has repeatedly singled out self-determination for teachers in the exercise of their freedoms of belief, speech, and association as vital to the preservation of that free spirit of academic inquiry without which our society cannot progress. (b) By stifling dissenting teachers' self-determination through the agency-shop, the Union can use compulsory public-sector collective bargaining to pervert the system of public education into a mechanism for indoctrinating students with the narrow political and ideological views of union leaders.

a. Academic freedom for individual teachers is a vital public concern which occupies a special preserve in the First and Fourteenth Amendments.

To emphasize the central position that public education, academic freedom, and self-determination for teachers play in our society, we could refer this Court to no authority more penetrating or eloquent than Mr. Justice Frankfurter's concurring opinion in *Wieman v. Updegraff*. "That our democracy ultimately rests on public opinion", he observed,

> is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
>
> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry.

344 U.S. 183, 196 (1952).

Mr. Justice Brennan was of a like mind when he wrote in *Keyishian v. Board of Regents*:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. * * * The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." * * * In *Sweezy v. New Hampshire*, 354 U.S. 234, 250, we said:
>
> > "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. * * * Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

385 U.S. 589, 603-04 (1967).

Thus this Court has recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools", and that the First and Fourteenth Amendments provide the primary guarantee that the academic community will remain an example of open-mindedness and free, critical inquiry. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Again, Mr. Justice Frankfurter's concurrence in *Wieman* reminds us that

> [b]y limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom

> of association, the Fourteenth Amendment protects all persons, no matter what their calling. *But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.* * * * [U]nwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.

344 U.S. at 195 (emphasis supplied).

Considerations such as these counsel the rigid exclusion of governmental interference from the intellectual life of our public schools—whether that intervention occurs in a straightforward manner "or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring). And this is true with respect not only to freedom of speech and association in purely academic matters, but also to the free and equal participation of teachers in debate on how their schools should be administered and public funds allotted to various operations in the schools. *Keyishian v. Board of Regents*, 385 U.S. 589, 607 (1967); *Pickering v. Board of Education*, 391 U.S. 563, 572 (1968).

In sum, we believe that this Court has unequivocally established that the First and Fourteenth Amendments secure for all teachers, irrespective of their affiliations with lawful private groups, a freedom of intellectual and professional self-determination, or personal sovereignty, of a sanctity as inviolate as the services they render to our democratic system are indispensable. The Amendments prohibit any form of governmental interference with academic affairs, not directly

and demonstrably related to professional competence, which tends to deprive teachers of the widest possible ambit for liberty of thought, speech, and association. For without that liberty, teachers could hardly hope to develop the faculties of open-mindedness and critical inquiry, or to exercise the free play of the spirit essential to their roles as exemplars of enlightened and responsible opinion.

Moreover, it goes without undue emphasis that the academic freedom which (in Mr. Justice Brennan's words) "discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection' ", is a freedom essentially *individual*, not collective, in nature. It is a freedom for each teacher to cast off the intellectual strait jacket of any orthodoxy—and to follow the dictates of his own conscience, immune from any command that he blindly conform his behavior to that of his colleagues.

But if this is the substance of the academic freedom which our Constitution protects, then the essential and inevitable effect of the PERA agency-shop scheme, and the tendencies of public-sector labor organizations such as the appellee Union to employ collective bargaining for their own narrow political and ideological purposes, make clear that the agency-shop is out of place in public education.

b. The agency-shop in public education defeats the purposes of academic freedom by imposing political and ideological conformity on dissenting teachers and students alike.

First, from the perspective of individual nonunion teachers, the agency-shop scheme is, simply put, a mechanism for stifling academic freedom by imposing political and ideological conformity.

We have already shown that payment of agency-shop "fees" has no rational relationship to the professional competence, moral character, or any other job-related credential of any teacher. *See supra* pp. 62-80, 132-47. The *non*payment of those fees, however, does have a rational relationship to *beliefs*: namely, to the beliefs of the Teachers that the principles and

policies of the Union are incompatible with the Teachers', their students', and the public's best interests, in respect of public education and otherwise. And their beliefs as to the merits of the Union and the effects of unionism on the public schools are one aspect—and, we submit, a vitally important aspect—of their academic freedom. For if academic freedom means anything, it means that the Teachers have a right to liberty of thought *and action* with regard to each and every matter that they feel affects their capacities to teach.

The PERA agency-shop scheme strikes directly at these beliefs. In essence, through coerced financial contributions and the pressures those contributions impose towards full membership, the law importunes the Teachers to conform their professional lives to the tenets and tactics of trade unionism. And its effect on freedom of association is clear: Can anyone imagine that, faced with the stark realities that agency-shop fees are identical to membership-dues and that only full union members have any opportunity to influence the course and content of collective bargaining and the Union's other political and ideological activities (*see* A.11, 27-28, 48), large numbers of nonunion teachers will not be compelled to participate in union affairs—not as *dissenters*, but as *regular rank-and-file unionists*? *See supra* pp. 99-115. And that being so, can anyone imagine that new or potential teachers in even larger numbers will not recognize the futility of dissent and concede control over their careers to the Union, from the beginning? And will not this behavior exemplify the very "caution and timidity in their associations" which Mr. Justice Frankfurter warned us in *Wieman* would be the inevitable result of an "unwarranted inhibition upon the free spirit of teachers"? *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion). But these questions answer themselves.

Secondly, the agency-shop scheme strikes directly at the interest in personal identity so important to the Teachers' academic freedom. The only legitimate rationale for the

exclusive-representation device is that it promotes administrative convenience by creating a single "voice" *for the work unit taken as a whole*. No one even pretends, however, that an exclusive representative is, in any proper sense of the term, the "spokesman" for *dissenting* employees *as individuals*. But when the Michigan Legislature went beyond exclusive representation, and appended the unnecessary and overbroad agency-shop authorization to PERA §10, it established a predicate on the basis of which the Union can parade as the Teachers' "spokesman": namely, the notion that the Teachers must finance the Union's activities because those activities are somehow "beneficial" to (and therefore implicitly approved by) the Teachers. *See* PERA §10(2), Mich. Stat. Ann. §17.455(10)(2) (1975 rev.). Indeed, before this Court the Union itself will no doubt dilate on the evil of "free riders"—thereby intimating that, for some unexplained reason, the Teachers should not be categorized as *forced passengers* (although that is a more accurate description of the effect of exclusive representation). Such arguments will be unavailing in this forum; but elsewhere, the existence of the agency-shop enables Union leaders to beguile the public into erroneously identifying the Teachers with the Union's political positions and programs—providing one more example of the recent tendency of state and federal governments to foster and support institutions which submerge dissenting individuals in huge and impersonal collectives, at the cost of basic liberties.

Now pending before this Court is a case which perfectly illustrates the problem posed by wantonly elevating statutory devices designed to serve evanescent considerations of expedience over constitutional principles written to preserve permanent human values from infringement by state coercion. We refer to *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, prob. juris. noted*, 96 S. Ct. 1408 (1976). In that case, the Wisconsin Supreme Court applied the logic of exclusive representation with almost fanatic single-mindedness to deny to nonunion public-

school teachers any right or privilege under the First and Fourteenth Amendments to petition their employer, an agency of state government, with respect to matters of intense public concern relating to an agency-shop scheme then being negotiated between the school board and the teachers' exclusive representative. In effect, the Wisconsin Court held that *nonunion teachers have no political personality of their own which they can assert against a demand for censorship by their exclusive representative*—that they are, in the classic Orwellian sense, *nonpersons*. Here, indeed, is the authentic voice of modern totalitarianism whispering from the pages of our judicial reports: the idea that the individual cannot be allowed to question, let alone to criticize, "Big Brother"; that the individual can take no position separate from the mass on controversial issues; that, in short, the impetus for thought and action must radiate from a single center outwards, sweeping individuals willy-nilly into *organizations* and *movements* which propel them forward on a course chartered by an elite coterie of "guardians".

The PERA agency-shop scheme is the obverse of the coin minted by the Wisconsin Court in *City of Madison*: the idea that the individual must affirmatively support "Big Brother" with his labor, if not his love; that the individual must lend his voice, directly or indirectly, to the mass chorus; that, in short, the individual must subordinate his separate identity to the collective personality—becoming (in the words of an administrator sensitive to the "new order" being forged in public-sector labor relations) just another "faggot in a large bundle". Port Umpqua Educ. Ass'n Request for "Fair-Share" Determination, Oregon PERB No. C-275, at 6 (Jan. 17, 1975) (recommendation by board agent J.B. Daniels). How these ideas could be compatible with academic (or any other kind of) freedom, we cannot imagine. Neither do we believe that this Court can provide us with an answer other than that the agency-shop scheme represents such a danger to the independence of individual teachers in our public schools that there exists a compelling public interest in disallowing it.

Finally, by strengthening the power of teacher-unions to misuse collective bargaining as a means of interfering in the educational process, the agency-shop scheme poses a distinct danger to the public interest. It is unnecessary to document the assertion that contemporary public education, especially in urban areas, is in a state of crisis. "Big city school systems", two noted political scientists tell us, "are commonly recognized to be in trouble, trouble relating to poor performance by students, high dropout rates, alienation of students and parents and rising costs." R. L. Bish & V. Ostrom, *Understanding Urban Government* 3 (1973). Admittedly, the abuse of compulsory public-sector collective bargaining by teacher-unions is not solely responsible for this state of affairs. But it has been a strongly contributing factor. In *Teachers and Power*, Mr. Robert J. Braun, Education Editor of the Newark (N.J.) *Star-Ledger*, detailed the policies which the American Federation of Teachers (parent organization of the appellee Union) has characteristically promoted, and their adverse effect on the public interest. Union pressure, Braun contends, has made public education so expensive that it now threatens to bankrupt the large cities. The union has opposed efforts by boards of education to "contract out" the teaching of basic skills to private firms which agree to payment contingent on acceptable academic performance by the students. It has opposed voucher systems which would permit parents to send their children to schools of their own choice. It has resisted, usually successfully, attempts by minority groups to decentralize big-city schools so as to tailor the education of minority children to their special needs. In short, according to Braun, the union is interested mainly, if not exclusively, in higher pay, lighter work-loads, and less and less emphasis on training in basic skills but more and more emphasis on devoting classroom time to "discussion" of controversial socio-political issues. *Teachers and Power* 244-76 (1972).

It is not surprising, then, that the AFT has done its best to suppress Mr. Braun's book, and its basic message: that *the union's fundamental interest in collective bargaining is to gain power to control the public-school system. See The Village Voice*, Dec. 21, 1972, at 35 (article by Nat Hentoff concerning the libel action threatened against both Braun and his publisher). For Braun's assertions are hardly an eccentric view. In one review of the book, Mario D. Fantini, Dean of Education of the State University of New York, quoted favorably the following description of the AFT:

> Because it is a union first and foremost, its organization is geared to war, to servicing strikes, to collecting new members * * *.
>
> * * * * *
>
> [T]he union hardly has displayed a depth of understanding of either the political or the educational process which would motivate a community willingly to turn over its schools to its kindly command. And there is little in its history, its present operations or its leadership, to indicate that the A.F.T. would know what to do with the public schools of the nation should it manage to assume control through contract—beyond, of course, increasing salaries, decreasing workloads, picking up more members and strengthening leadership control at the top.

According to Dean Fantini, "Braun is essentially correct in his assessment; teacher organizations do appear to be on a collision course with the public." Book Review, *The New York Times*, May 28, 1972, at 3.

In another review of the book, Mr. Mortimer Smith of the Council for Basic Education observes that we "are moving rapidly towards a monolithic situation where teachers will be expected to be loyal not to the school or to the children or the administration or school board, but to the union." He, too, quotes favorably Mr. Braun's conclusion to the effect that the AFT has no real interest in education, that its main objective is "freedom from administrative and parental

interference", that as its power grows "the kids will be pawns in the game", and that citizens "would even have less, perhaps nothing, to say about the direction of the school to which [they] send [their] children and [their] tax dollar." Book Review, *Council for Better Education*, Sept. 1972.

So long as taxpayers remain a diffuse, unorganized group, while public-sector unions enjoy the special, compact political power derived from compulsory collective bargaining, the exclusive-representation device, *and now the agency-shop*, the taxpayers must fight the losing battle Mr. Smith describes. As respected commentators have pointed out,

> if a teachers' union were to insist through collective bargaining (with the strike or its threat) upon major changes in school curriculum, would not that union have to be considerably less skillful and efficient in the normal political process than other advocates of community change? *The point is that with respect to some subjects, collective bargaining may be too powerful a lever on municipal decision-making, too effective a technique for changing or preventing the change of one small but important part of the "current state of affairs."*

Wellington & Winter, "Structuring Collective Bargaining in Public Employment", 79 *Yale L.J.* 805, 860 (1970) (emphasis supplied).

What, indeed, are the political implications of converting public education from a public trust into a platform where union activists can first coerce political and ideological conformity among dissenting teachers, and then indoctrinate impressionable students with the union "line" on difficult and controversial social issues, instead of concentrating on basic learning skills? Parents send their children to school to provide them with hard information from objective instructors, not propaganda served up by agitators passing as teachers. And in a system unhampered and undistorted by special advantages given to a privileged group to coerce conformity with its designs, parents would have a chance to

receive from the public schools the sort of services that accord with the community's consensus as to its needs. The model of a free society presumes that

> [d]ecisions of the municipal government emanate from *no single source*, but from many centers; conflicts and clashes are referred to *no single authority*, but are settled at many levels and at many points in the system: *no single group* can guarantee the success of any proposal it supports, the defeat of every idea it objects to.

Kaufman, "Metropolitan Leadership", *quoted in* N. Polsby, *Community Power and Political Theory* 127-28 (1963) (emphasis supplied). But the model of a free society presupposes that no social group possesses special powers and privileges of compulsion and coercion such as the Union does under the PERA agency-shop authorization. When the presuppositions are not satisfied, the system fails. It is as simple as that, and as tragic.

The public interest in education and the agency-shop are mutually incompatible. That being so, there can be no justification for imposing that scheme on the Teachers, at the cost of their academic freedom.

3.

As an instrument for financing the Union's political and ideological activism, the agency-shop is incompatible with representative government.

The idea that our political system presumes the absence of any single source, authority, or group which can guarantee the success of every proposal it supports or the defeat of every program it opposes leads us directly to the second fundamental conflict between the agency-shop and the public interest: namely, the conflict between specially privileged union political power and popular, representative government. We shall consider three points: (a) Fundamental to our system of government is legal equality of opportunity, for all individuals, to influence the political decision-making process.

(b) The coercion to ideological conformity worked by the agency-shop threatens to pervert the process of government by providing an extraordinary measure of political influence to union leaders. (c) This Court has already indicated in the Hatch-Act cases that such a result is incompatible with the public interest.

a. All citizens, whether organized in public-sector trade unions or not, have an equal interest and right to participate in the process of representative government.

The American system of representative, republican self-government is based on the presupposition that the state may act only for the *common*, or *public*, good. As so many of our constitutional traditions do, this concept traces back to the thought and writing of John Locke. *See, e.g., Second Treatise on Government* §§89, 110, 131, 135, 142 *and passim.* From the very beginning of our nation, we have taken it as an article of faith that

> government is, or ought to be, instituted for the common benefit, protection and security of the people * * * and not for the particular emolument or advantage of any single man, * * * or sett of men, who are a part only of that community * * *.

Pa. Const. declaration of rights §5 (1776); *accord*, Del. declaration of rights §§1, 5 (1776); Md. Const. declaration of rights §4 (1776); Mass. Const. preamble, pt. 1, art. 7 (1780); N.H. Const. pt. 1, arts. 1, 8, 10 (1784); Vt. Const. ch. 1, §§5-7 (1777); Va. Const. bill of rights §3 (1776); U.S. Const. preamble (1789). Thence the precept emerges that *all* of the people are entitled to legal equality of opportunity to exercise a voice in the governmental process. For a representative, republican government cannot exist separate from the people, but "rests on the foundation of a belief in rule by the people—not some, but all the people." *United Public Workers v. Mitchell*, 330 U.S. 75, 114 (1947) (Black, J., dissenting).

Our system of popular sovereignty presupposes that governmental programs and policies will represent a consensus derived in some regular manner from the sometimes complementary, sometimes conflicting, interests of the people *taken as a whole*. It is the operation of this process, and this process only, which uniquely determines the *public* interest—that is, the process by which a free people, acting individually or in voluntary associations *none of which possesses monopolistic powers rivalling those of government itself*, seeks to secure through governmental action the kind of services the majority desires and the minority can accept. We might describe our system, then, as one of *pure procedural justice*: a system designed, not to advance particular substantive views favoring specially privileged interests, but rather to define a general procedure for making decisions in the common interest, reserving the question of the specific content of public policy to be settled by the unimpeded operation of the process itself. *Cf.* B. Barry, *Political Argument* ch. vi (1965). As Mr. Justice Harlan said, concurring in *Hunter v. Erickson*,

> laws which define the structure of political institutions * * * are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents.

393 U.S. 385, 393 (1969).

Such a system can function, however, only if the basic rules do not themselves embody *or tolerate* any mechanism which arbitrarily favors one group over all others in the competition to acquire and exercise political influence. Of course, the actions of government affect different individuals, classes, and interests in different and unequal ways. But there is no rational or objective means to measure these differences, or to compensate for them by "weighting" the political voices of some differently from the voices of others. Therefore, our system of government irrebuttably presumes that access to the political process must be available to all on an equal basis.

And so this Court has held, time and again. *E.g.*, *Lubin v. Panish*, 415 U.S. 709 (1974); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964).

It is self-evident, we submit, that this principle of political equality for all citizens is, and must be, a true "absolute" of constitutional law—since to undermine it in any way simultaneously undermines the very legitimacy of government itself. And, for that reason, there could never be an occasion to depart from it, in order to enhance or to weaken the political position of any social group.

b. The agency-shop enhances the political power of public-employee unions at the expense of all other citizens.

The agency-shop in public employment creates conditions incompatible with the principle of political equality for all citizens. As we have demonstrated, public-sector labor relations are an inextricable part of the political process; and public-employee unions are among the most active and powerful political pressure-groups in the country, rivalling even the major political parties themselves. *Supra* pp. 62-80. *No one seriously denies this*. Indeed, union leaders themselves boldly declare their intentions to extend and exploit their power to its utmost limits. And by their unstinting efforts to have such laws enacted, they admit that the PERA agency-shop scheme is a key weapon in their struggle for political power. For, in conjunction with exclusive representation, the agency-shop allows unions to exercise a *quasi*-governmental authority over public employees. *See supra* pp. 150-53. And control over public employees carries with it the power to bring both politicians, and the general public, to their knees.

Our process of representative government is poorly prepared to meet the political challenge of unions empowered to compel

unwilling civil servants to contribute financial support to campaigns of political and ideological activism. The general public is, in political terms, a diffuse, unorganized agglomeration of individuals and groups—none of which possesses any power to coerce compliance with its demands from the others. Conversely, public-sector unions constitute compact, structured organizations with institutional continuity, political sophistication—and, above all else, the special privilege of compulsion provided by the agency-shop. Under these circumstances, public-sector unions may now possess means sufficient to overcome all other social forces contending for the attention of government, for control over the disposition of public resources, and for influence in the determination of public policy. *And no one seriously denies this, either.*

Professor Summers, for example, has pointed out that

> [i]n the public sector employees already have, as citizens, a voice in decisionmaking through customary political channels. *The purpose of collective bargaining is to give them * * * a larger voice than the ordinary citizen.*

"Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156, 1193 (1974) (emphasis supplied). In his view,

> [o]ne consequence of public employee bargaining is at least partial preclusion of public discussion of those subjects being bargained. And the effect of an agreement [between the union and the employer] is to foreclose any change in matters agreed upon during the term of the agreement.

Id. at 1192 (footnote omitted). On the basis of observations such as these, moreover, other careful observers have asked

> *whether the attempt to institutionalize collective bargaining procedures in government would, in effect, remove the public from any decisional role in a policy area that has a direct bearing on the lives of citizens.* * * * Certainly, decisions pertaining to employee job interests, through their effects upon cost and services, are crucial to the public as well as to the employees. The problem can be expressed in the form of the following hypothesis: *the "professionalization" of collective bargaining will intensify the forces of bureaucracy and elitism in government, and result in a further erosion of the citizen's capacity to govern his affairs through access to the machinery of government on a basis of equality with other citizens.*

Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 *Ind. Rel.* 18, 24 (1972) (emphasis supplied in part). And at least one federal court has upheld the discretion of a state legislature to ban all public-sector bargaining on the explicit theory that "sovereignty * * * signifies the right of the people of a state to govern themselves under the form of government of their choosing" and that "the prospect of public employee collective bargaining impinges upon those rights." *Winston-Salem/Forsyth County Unit, Educators' Association v. Phillips*, 381 F.Supp. 644, 648 n.4 (M.D.N.C. 1974) (three-judge court).

Given the unalterably political nature of public-sector collective bargaining itself (as recognized in statements such as the foregoing), and the potential for partisan political activism of public-employee unions (as judicially noticed by the Michigan Court of Appeals), we are entitled to wonder whether our political system and the politicians who administer it can adequately cope with the dangers the situation presents. Popular sovereignty ultimately rests upon the responsiveness of public officials to the demands of individuals and the voluntary associations which they form in order to advance their political and social interests. But it is a notorious fact of American political life that running for popular office is an expensive proposition, which leads politicians increasingly to seek the support of well-financed pressure groups, especially those with large voting constituencies. In the framework of these considerations it is easy to detect a deleterious effect on popular sovereignty from the near-universal unionization of public employees which schemes such as the PERA agency-shop promote.

We should have to scorn reality in order to believe that

public officials will resolutely defend the interests of unorganized taxpayers when confronted with the demands of public-employee unions which command both sizable financial resources and a politically disciplined *bloc* of votes. "Those in power," commented Mr. Justice Stewart, "whatever their politics, want only to perpetuate it." *Branzburg v. Hayes*, 408 U.S. 665, 724-25 (1972) (dissenting opinion). And successful public-sector unions have learned how to "intertwin[e] themselves with their nominal employer through patronage-political support arrangements." Burton & Krider, "The Role and Consequences of Strikes by Public Employees", 79 *Yale L.J.* 418, 432 (1970). Indeed, this "intertwining" has become such a commonplace that it has already been given a name: the "Hanslowe Effect", after Professor K. L. Hanslowe of Cornell, who first brought scholarly attention to the potential inherent in laws coercing union membership

> of becoming a neat mutual back scratching mechanism, whereby public employee representatives and politicians reinforce the other's interest and domain, with the individual public employee and the individual citizen left to look on, while his employment conditions and his tax rate and public policies generally are being decided by entrenched and mutually supportive government officials and collective bargaining representatives over whom the public has diminishing control.

The Emerging Law of Labor Relations in Public Employment 115 (1967).

In the private sector, the "Hanslowe Effect" appears in the form of the "sweetheart" contract. But it is hardly as insidious and dangerous there as it is in government employment. In the private sector, market forces of supply and demand, and the ever-present necessity to make a profit, all insure that most employers will resist unreasonable union demands in collective bargaining. Thus, the union generally remains on one side of the bargaining table, and the employer on the other. In the public sector, conversely, the political

nature of collective bargaining, the political aspirations of public officials, and the political activism of public-sector unions all conspire to establish a curiously inverted condition. With politicians actually or potentially beholden to unions for political support, the unions come in fact to occupy the advantageous position that private employers appeared to possess before the law prohibited company support of employee representatives. That is, the unions in effect sit on *both* sides of the bargaining table. Moreover, since there is no necessity that public services show a profit, the resistance of public officials to union political pressures is even further reduced. The lack of effective market checks, in addition to the "Hanslowe Effect", thus makes the danger from union political strength a critical, and perhaps fatal, threat to control of elected and appointed public officials by the taxpaying public.

We submit, therefore, that there is a substantial rational basis in the argument that, the more schemes such as the PERA agency-shop increase the financial receipts of, and coerce nonunion employees to seek membership in, militant public-sector labor organizations such as the appellee Union, the more such unions will be able to exchange dollars *and* votes for special political influence at the expense of society in general. And we submit that *such a logical and documented potential for abuse in and of itself creates a compelling public interest in disallowing the agency-shop in public employment.* After all, if (as this Court has said) "the integrity of our system of representative democracy is undermined" "[t]o the extent that large contributions are given to secure political quid pro quos from current and potential office holders", then what even more adverse effect on popular sovereignty must be occasioned by a scheme which compels innocent public employees, as a condition of the privilege to serve society as teachers, to finance the activities of organizations uniquely situated, qualified, and motivated to pervert the political process? *Buckley v. Valeo*, ____ U.S. ____, ____, 96 S.Ct. 612, 638-39 (1976).

c. In the Hatch-Act cases, this Court held that there is an overriding public interest in denying public employees the privilege to engage in political activities inimical to the good order and proper functioning of government.

We believe that this Court has already decided, in principle, that a compelling public interest exists in disallowing the PERA agency-shop scheme. "[T]he judgment of history", the Court observed in the *Letter Carriers* decision is

> that it is in the best interest of the country, *indeed essential*, that federal service should depend upon meritorious performance rather than political service, *and that the political influence of federal employees on others and on the electoral process should be limited.*

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 557 (1973) (emphasis supplied); *accord, Broadrick v. Oklahoma*, 413 U.S. 601, 606-07 (1973) (state employees). For that reason, it rejected a constitutional challenge brought under the First Amendment against provisions of the Hatch Act which ban partisan political activities by employees of the federal government. Four reasons were advanced for its decision:

> [Government employees] should administer the law in accordance with the will of [the legislature], *rather than in accordance with their own will or the will of a political party.* * * *
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> * * * * *
>
> [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but *it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.*
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> * * * * *
>
> [T]*he rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine.* * * [S]*ubstantial barriers should be raised against* * * *using the thousands*

> *or hundreds of thousands of [government] employees, paid for at public expense, to man [a party's] political structure and political campaigns.*
>
> * * * * *
>
> [E]*mployment and advancement in the Government service [should] not depend on political performance*, and * * * Government employees [sh]ould be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out of their own beliefs.

413 U.S. at 564-66 (emphasis supplied throughout).

In essence, *Letter Carriers* teaches that the First Amendment simply does not extend a privilege to public employees, individually or in an association, to engage in partisan political activism which is itself incompatible with the impartiality, efficiency, and good order of the public service, or which perverts that service into *a tool for improperly influencing the electoral process.* And therefore, as long as the governmental regulations proscribing such activism are not substantially overbroad, they raise no constitutional issue, since no constitutional "right" exists to engage in the proscribed conduct. *See Letter Carriers*, 413 U.S. at 575-81; *Broadrick*, 413 U.S. at 607-18.

Of particular significance here is the footnote in which the Court recounted allegations that the Hatch Act impermissibly burdens the political activism of members and officers of public-employee unions:

> The Union alleged that its members were desirous of "a. Running in local elections for such offices as school board member, city council member or mayor. "b. Writing letters on political subjects to newspapers. "c. Participating as a delegate in a political convention and running for office in a political party."
>
> * * * * *
>
> Plaintiff Mandicino alleged that *as an active member and officer of plaintiff Union he "was compelled to*

> *engage in political activities prohibited by . . . the Hatch Act in order to carry out the responsibilities of his offices*," and that he had engaged in those "activities including house-to-house campaigning for candidates of political parties, participation as a delegate in conventions of a political party, active participation in the affairs of a political party, and fund raising on behalf of political parties and candidates."

413 U.S. at 551 n.3 (emphasis supplied). In the context of the Court's decision, this reference clearly indicates that extirpating partisan political pressure on the public service is so paramount a value that it removes from First-Amendment protection even those political activities which may be inherent in and necessary to the operations of public-employee labor unions.

We believe that *Letter Carriers* thus provides convincing support for the following proposition: *If the public interest in the politically impartial administration of government service is so substantial as to remove from the First Amendment certain union political activities which would otherwise be entitled to constitutional protection, then there is a compelling public interest in disallowing any statutory scheme which authorizes unions to exercise extraordinary political influence over that service.* And if this proposition is correct, then it necessarily implies the further conclusion that there is a compelling public interest in disallowing all forms of compulsory public-sector unionism, such as the agency-shop, which operate to enhance the power of unions to compel political and ideological conformity among public employees.

Reference to the four considerations detailed in *Letter Carriers* supports this conclusion. First, when public-sector unions exercise extraordinary political control over civil servants, they can mold public policy "in accordance with their own will" and not in accordance with the will of the community as expressed through the constitutional political process. Secondly, to the extent that the public perceives the extraordinary political influence public-sector unions enjoy

and exercise, "confidence in the system of representative Government is * * * eroded to a disastrous extent." That this has long been the situation, especially in urban areas, needs no emphasis here. *See, e.g.*, Editorial: "The Governor's Legacy". *The New York Times*, Feb. 12, 1968, at 38, col. 1. Thirdly, through its compulsion to membership and the derivative effect of transferring employee-loyalties from public employers to unions, the agency-shop enables union leaders to employ "the rapidly expanding Government work force * * * to build a powerful, invincible, and perhaps corrupt political machine." It is notorious, after all, that the heart of union political strength lies not in direct *financial* contributions to candidates but in the provision of campaign-related *services* by union officials and members. *See, e.g.*, H. Alexander, *Financing the 1968 Election* 194 (1971). And it is equally obvious that public-sector unions are uniquely situated and motivated to use "the thousands or hundreds of thousands of [government] employees, paid at public expense, to man [a party's] political structure and political campaigns." This to be sure, is "public financing" with a vengeance. Finally, the agency-shop in essence makes employment in the government service "depend on political performance"—since its necessary effect is to compel full union-membership, and thereby to subject employees to constant pressure to conform and curry favor with union officials, "rather than to act out of their own beliefs." *Cf.* 413 U.S. at 564-66.

In short, by every indicium recognized in the *Letter Carriers* case, there is a compelling public interest in prohibiting the PERA agency-shop scheme outright. *A fortiori*, then, there cannot be a substantial state interest in imposing that scheme at the cost of the Teachers' associational and political autonomy.

It is fitting at this point to advert briefly to an important distinction between the situation presented in this case, and that which underlay *Lathrop v. Donohue*, 367 U.S. 820

(1961). As we have noted, the Court in *Lathrop* split four ways over the constitutionality of applying lawyers' dues to the allegedly political activities of the integrated bar. *See supra* pp. 51-56. *Lathrop*, therefore, is no binding precedent for, or against, the Teachers. But it is instructive, none the less. *Lathrop* involved alleged political activities *of an agency of the state judiciary, which activities were conceded to be in aid of the legislative process and of the regulation of the legal profession in the public interest. See supra* pp. 55-56. In this case, conversely, the political activities of the Union are *in aid of subversion of the legislative and administrative process for the private benefit of the Union's members.* If, therefore, the several opinions in *Lathrop* correctly perceived serious constitutional questions in the integrated bar, then *a fortiori* such questions arise as to the agency-shop. For the integrated bar on its face serves a valid state purpose wholly compatible with popular sovereignty; whereas, the agency-shop constitutes an important part of a process which poses a substantial threat to representative government.

4.

As an instrument for transferring the loyalties of public employees from their employer to the Union, the agency-shop is incompatible with governmental sovereignty.

Finally, and most importantly, we submit that there is a compelling public interest in disallowing the PERA agency-shop scheme because of its erosive effect on governmental sovereignty. We shall establish this contention as follows: (a) No one denies that governmental sovereignty—by which we mean the unchallenged, undivided, and supreme power to govern the community—is vital not only to the freedom of our society but also to its very existence in peace and order.

(b) By coercing public employees to transfer their loyalties from their employer to unions, the agency-shop undermines the ability of government to perform its most vital functions. (c) Once a public-employee union gains the special privilege to "tax" dissenting employees through the agency-shop, it can ensconce itself in a position of political strength sufficient to ignore or frustrate the existing bans on public-sector strikes, and thereby challenge governmental sovereignty through direct action.

a. The existence of a free and ordered society demands that government exercise undiluted sovereign power over all matters within its jurisdiction.

The prime lesson of Western political history since the Dark Ages is that people cannot be free and secure in their daily activities unless their government is endowed with supreme—*sovereign*—power within its appointed sphere of action. A collection of people lacking a sovereign government is not an ordered society, but a mere aggregate of individuals living in a condition best described as feudalistic or anarchic. Indeed, an institution cannot be a *government* in the logically proper sense of the term unless it has undivided and unchallenged power to perform the functions allocated to it by its constituents—whether those functions pertain to the military, the law courts, the police and fire departments, sanitation, transportation, or the public schools. In the American system this point is peculiarly obvious; for our theory of *limited* government presumes that the state should take on only those functions so vitally important to the community that their accomplishment cannot safely be left to the discretion of private parties.

This concept of sovereign government is an inextricable part of our political tradition, tracing its heritage to the fountainhead of American political science, John Locke.

According to Locke, sovereignty is *the* necessary bulwark, in logic and in practice, against the dissolution of society:

> [W]hen either the Legislative is changed, or the Legislators act contrary to the end for which they were constituted; those who are guilty are *guilty of Rebellion*. For if any one by force takes away the establish'd Legislative of any society, and the Laws by them made pursuant to their trust, he thereby takes away the Umpirage, which everyone had consented to, for a peaceable decision of all their Controversies, and a bar to the state of War amongst them. They, who remove, or change the Legislative, take away this decisive power, which no Body can have, but by the appointment and consent of the People; and so destroying the Authority, which the People did, and no Body else can set up, and introducing a Power, which the People hath not authoriz'd, they actually *introduce a state of War*, which is that of Force without Authority: and thus by removing the Legislative establish'd by the Society (in whose decisions the People acquiesced and united, as to that of their own will), they unty the Knot, and expose the People a new to the state of War. * * *

* * * * *

> [W]hoever, either Ruler or Subject, by force goes about to invade the Rights of * * * [the] People, and lays the foundation for *overturning* the Constitution and Frame of *any Just Government*, is guilty of the greatest Crime * * * a Man is capable of, being to answer for all those mischiefs of Blood, Rapine, and Desolation, which the breaking to pieces of Governments bring on a Country. And he who does it, is justly to be esteemed the common Enemy and Pest of Mankind; and is to be treated accordingly.

Second Treatise on Government §§227, 230 (P. Laslett ed. 1960). More recently, that keen observer of social institutions, Sir Henry Maine, emphasized that

> the greatest [domestic duty of a nation is] that its government should compel obedience to the law, civil and criminal. The vulgar impression is, no doubt, that laws enforce themselves. * * * But the truth is * * * that it is always the State which causes laws to be obeyed. * * * If any government should be tempted to neglect, even for a moment, its function of compelling obedience to law—if a Democracy, for example, were to allow a portion of the multitude of which it consists to set some law at defiance which it happens to dislike—it would be guilty of a crime which hardly any other virtue could redeem, and which century upon century might fail to repair.

Popular Government 63-64 (1885). In short, the business of government—indeed, the fundamental duty which defines and makes legitimate its very existence—is to see that no group of men, no matter its purpose, can successfully challenge the authority and power of society.

No *sovereign* government can long survive the introduction into society of competing private associations endowed with or claiming similar powers of compulsion and coercion. Indeed, when such associations have appeared or arisen, history has denoted their competition as *invasions* or *rebellions*—thereby recognizing that their very existence signified a struggle for sovereignty with the established order. Still less can any *sovereign* government long survive the internal dissipation of its power to rule when it delegates some portion of its authority to a competing private association, or when such an association, armed with special privileges of coercion, draws from the government to itself the loyalties of the very persons through whom that government must perform the tasks allocated it by society.

This analysis, we submit, adduces a self-evident proposition—the logic of which, as we shall now show, precludes any possibility that the agency-shop could be in the public interest.

b. The PERA agency-shop scheme is incompatible with governmental sovereignty.

As the Supreme Court of Missouri observed,

> [u]nder our form of government, public office or employ-

> ment never has been and cannot become a matter of bargaining and contract. * * * This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service involves the exercise of legislative powers * * * and any attempted delegation thereof is void. * * * If such powers cannot be delegated, they surely cannot be bargained away or contracted away, and certainly not by any administrative or executive officers who cannot have any legislative powers.

City of Springfield v. Clouse, 356 Mo. 1239, 1251, 206 S.W.2d 539, 545 (1947); *accord, Hagerman v. Dayton*, 147 Ohio St. 313, 71 N.E.2d 246 (1947). In essence, this opinion recognizes that *there is no private-sector analogy properly applicable to government which would sustain an extension of every practice accepted in private-sector collective bargaining to public-sector employment.* For public employees "occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose." *Norwalk Teachers Association v. Board of Education*, 138 Conn. 269, 276, 83 A.2d 482, 485 (1951).

That the agency-shop is an anomalous anachorism in the public sector is a necessary consequence of the fundamental distinction between private and public action to which such decisions refer. The basic principle of action in the private sector is *agreement*—whereas, in the public sector it is *compulsion.* Compulsory collective-bargaining laws do not force private employers *to bargain*; what such laws do is to deny the employers their common-law privilege *to choose their bargaining partners.* They must bargain with majority unions, not individual employees. If there were no such laws, private employers would still have to bargain with their employees. They could not *compel* anyone to work for them. Still less could they "unilaterally" dictate the terms and conditions of employment, since these are rigorously determined for both employers and employees by supply-and-demand conditions in the relevant markets. *See, e.g.*, L. von Mises, *Human Action* ch. xxi (3d rev. ed. 1966).

The case is different with government, society's monopolistic agency of compulsion. In contrast to private business, government legitimately forces *everyone* to work for it, through taxation or the draft. To be sure, government does not customarily draft public employees; *but it has the authority to do so should society's needs require it.* This is the essence of its *sovereign* power and authority. But if sovereignty *means* the supreme *and unchallengeable* power of compulsion, in questions of public employment as elsewhere, it would be absurd to suggest that government could permit its employees to come under the control or influence of another authority—at least *while remaining sovereign.*

Yet, as we have shown, that is precisely what happens under the PERA agency-shop scheme. As soon as a union is granted the status of an exclusive representative, employees begin to experience psychological and other pressures to place in it their primary loyalties. *See supra* pp. 151-52. The ultimate point in this transfer of loyalties is reached when, as here, the law also compels dissenting employees to finance the union through agency-shop payments. Such a law is an excellent measure from the point of view of union officials. However, its vice lies in the implicit assumption it makes—and communicates to the employees—that they owe the benefits of public employment, not to the government or the taxpayers, but to the union. When conflict arises between the people and their government, on the one side, and public employees and their union, on the other, to which side will the employees lend their support? Encouraged by exclusive representation and the agency-shop to consider *the union*—not the government, not the people—as *their* sovereign, they will tend to close ranks behind union leaders, in spite of anti-strike laws and the critical needs of the citizenry which they are employed and paid to serve. And so the newspapers report, day after day, in a never-ending catalogue of "labor unrest" in the public sector.

Here, then, is a classic example of the phenomenon of the

internal dissolution of sovereign government. Through the agency-shop, government voluntarily relinquishes part of the power to govern delegated to it by the sovereign people, and aids a set of private persons—union leaders—to establish an independent and competing center of sovereign authority.

> [A]nd so destroying the Authority, which the People did, and no Body else can set up, and introducing a Power, which the People hath not authoriz'd, [the legislators] actually *introduce a state of War*, which is that of Force without Authority * * *.

J. Locke, *Second Treatise on Government* §227 (P. Laslett ed. 1960). And to this necessary consequence of the dissolution of governmental sovereignty, we now turn.

c. The agency-shop materially enhances the ability of public-sector unions to challenge governmental sovereignty through strikes and other forms of direct action.

As a practical matter, it is not possible to compel public-sector collective bargaining *and* prohibit public-sector strikes. Interpersonal coöperation can be carried on either by way of *agreement*, or by way of *command*. The way of agreement, implicit in the process of collective bargaining, implies a privilege in the parties *to refuse* to deal with each other except on mutually satisfactory terms. Therefore, if the method of agreement, collective or otherwise, is to replace the method of command in public employment, then it is necessary that the privilege indispensable to the method of agreement accompany the shift. Otherwise, it is all a sham. *See, e.g.*, Kheel, "Strikes and Public Employment", 67 *Mich. L. Rev.* 931 (1969); Wollett, "The Coming Revolution in Public School Management", 67 *Mich. L. Rev.* 1017 (1969). And union leaders recognize this: "You can't have collective bargaining and take away the right to strike. It's a tragedy." Montana, "Striking Teachers, Welfare, Transit and Sanitation

Workers", 19 *Lab. L.J.* 273, 289 (1968) (quoting Victor Gotbaum, president of AFSCME District 37, objecting to the strike-ban in New York's "Taylor Law").

Once endowed with the power to command employee loyalty, public-sector union leaders are not likely to remain passive victims of this "tragedy", as contemporary events demonstrate. This, however, creates another dilemma. For if collective bargaining without a privilege to strike is a sham, any government whose employees may strike is less than a sham. Even commentators not unfriendly to collective bargaining emphasize that "the major, long-run social cost of strikes in public employment" is "a distortion of the political process"—because public-sector strikes are a "political force" which "radically alter[s]" our system of government by transferring "a disproportionate share of effective power in the process of decision" to union officials. Wellington & Winter, "Structuring Collective Bargaining in Public Employment", 79 *Yale L.J.* 805, 822 (1970); Boynton, "Industrial Collective Bargaining in the Public Sector: Because It's There?", 21 *Catholic L. Rev.* 568, 576 (1972); Wellington & Winter, "The Limits of Collective Bargaining in Public Employment", 78 *Yale L.J.* 1107, 1123-24 (1969).

The state courts have defined the problem even more clearly. The vast majority of decisions recognizes that strikes to enforce the demands of public-employee unions are in direct contravention of the principle that government must serve *all* the people, not specially favored groups; that they contravene the duty inherent in public employment to refrain from conduct which interferes with the efficiency and good order of government; and that, ultimately, they constitute an attempt to coerce a delegation to union leaders of the discretion which government alone must exercise in the fulfillment of its duties. *E.g., Norwalk Teachers' Association v. Board of Education*, 138 Conn. 269, 273, 276, 83 A.2d 482, 484, 485 (1951); *Board of Education v. Redding*, 32 Ill.2d 567, 572, 207 N.E.2d 427, 430 (1965); *City of*

Cleveland v. Motor Coach Employees, Division 268, 90 N.E.2d 711, 714 (Ohio C.P. 1949); *City of Pawtucket v. Teachers, Local 930*, 87 R.I. 364, 371, 373, 141 A.2d 624, 628, 629 (1958). The state courts have repeatedly warned that, should unions acquire the power to strike at will and without public resistance, the necessary consequence would be the destruction of the democratic legislative process–and, therefore, that to permit unions to halt or check the functions of government unless their demands are met would be to transfer to them all legislative, executive, and judicial power. Since this would be to sanction "rebellion against government" and to provide efficacious "means of destroying government", "[n]othing would be more ridiculous". *City of New York v. De Lury*, 23 N.Y.2d 175, 183, 295 N.Y.S.2d 901, 906, 243 N.E.2d 128, 132 (1968), *appeal dismissed*, 394 U.S. 455 (1969); *Railway Mail Association v. Murphy*, 180 Misc. 868, 875, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943); *Motor Coach Employees, Division 268*, 90 N.E.2d at 715.

But enacting laws to prohibit public-sector strikes is one thing, and making them work something else again. Despite their illegality in almost all of the states, public-sector strikes have increased by over one thousand *per cent* during the last decade. *See* Table I, *supra* p. 123. At least one reason for this is obvious: namely, *the increasing power of public-employee unions*, to which Michigan has substantially added through the PERA agency-shop scheme.

Unions are primarily devices for concerting and concentrating otherwise diffuse employee-pressures against resisting employers, private or governmental. Their major purpose is to direct such pressures into channels and tactics which will seriously embarrass the operation of the employment unit in question, private or governmental, by doing the maximum possible harm to the segment of the community, consumers or taxpayers, served by the employer. The notion of a "spontaneous" *concerted* work-stoppage is a contradiction in terms. Planning and focusing are almost always the prerequisite to a *concerted* stoppage of work. *And unions are agencies specialized for this function.* It is their fundamental, if not exclusive, reason for being. Indeed, they may without prejudice or overstatement be called professional strike agencies–agencies which have acquired expertise in the timing and management of strikes, to the end of maximizing their effectiveness.

There is little reason, therefore, for assuming that once public-sector unions have acquired a potential power to strike they will not exercise that power whenever they meet resistance to their vital demands. *See, e.g.*, Smith, "State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis", 67 *Mich. L. Rev.* 891, 917 (1969) (predicting increases in public-sector strikes "as the areas of organization and collective bargaining * * * expand"). For unions must do everything expected of them when employers resist the demands to which union leaders have induced their members to believe themselves entitled. They must perform the strike-function when all else fails. Otherwise, their very reason for being disappears.

If this is true, however, what possible justification can there be for *strengthening* the already considerable and demonstrated ability of public-sector unions to engage in disruptive activities? What possible public interest can be served by a scheme such as the PERA agency-shop–which increases the unions' treasuries, encourages employees to transfer their loyalties to the unions, and even coerces full union-membership? What compelling, or even legitimate, reason can be advanced for a scheme that helps to subsidize strikes, to subvert employer-employee solidarity, and to subject more and more public employees to the unions' internal rules and discipline? How can *this* result be compatible with governmental sovereignty in the long term? We submit that it cannot–and therefore, that the PERA agency-shop scheme is repugnant on its face to the compelling public interest in the uninterrupted provision of governmental services.

Even union leaders do not dare to claim that their organizations' anti-social strike-threat activities should be subsidized from general state revenues. For if they presented such a straight-forward demand, they would be called upon at once to identify the public interest behind a scheme that taxed society to support the subversion of its most important institution: and they know that no such interest exists. *Cf. Coppage v. Kansas*, 236 U.S. 1, 16-17 (1915). Instead, they have employed the indirect means of the PERA agency-shop to achieve what is foreclosed to them by a direct approach. But the financial result is the same: the unions' treasuries swell by the identical amounts, whether Michigan selectively "taxes" dissenting employees, or promiscuously burdens society in general. And the agency-shop provides the added benefit of compelling organizational membership, and thereby increasing the *quantum* of direct control which union leaders can exercise over public employees. What it does *not* provide is the *visibility* which a system of direct subsidies would have. It hides from the public what is actually going on, in the jargon of "service fees", "free riders", and the like—the "newspeak" idioms for the process of extortion through which *true* public servants, *whose loyalties remain with their employer and the taxpayers*, are "shaken down" for the funds that union leaders then divert into activities antagonistic to the public interest.

In sum, we have established in this part of the brief that the PERA agency-shop scheme is repugnant *per se* to the First and Fourteenth Amendments; that the Michigan Court of Appeals has already held that it cannot satisfy the "balancing test" because of overbreadth; and that, in addition, it represents an excessive and unnecessary extension of the exclusive-representation device which threatens at least three compelling public interests. These showings conclude our positive constitutional case—a case, we believe, which is beyond refutation.

In Parts III. and IV., *infra*, we turn to an examination of the series of errors through which the Michigan Court of Appeals concluded otherwise.

III.

The equivocal treatment of *Hanson* by the court below served only to confuse the issues. To the limited extent that *Hanson*, a private-sector case, is at all relevant here, it is suggestive authority in favor of the Teachers because it broadly intimated that forcing even private-sector employees financially to support political activities to which they were opposed would be unconstitutional.

The main authority cited by the court below in refusing to invalidate the agency-shop provision of the Michigan PERA outright was this Court's decision in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). While thus referring in a curious way (*cf.* pp. 195-99 *infra*) to *Hanson*, a *private-sector* case, the court below made no reference to the long line of *public-sector-employment* cases, pre-dating and post-dating *Hanson*, in which this Court developed the unconstitutional-conditions principle which we have reviewed *supra* pp. 21-40, and which we believe to be controlling here. This preference for the irrelevant over the relevant precedents cannot be attributed to any delinquency on the part of the Teachers' counsel, who have persistently urged before the courts below, as they have done here, that the unconstitutional-conditions principle is dispositive of the present case.

It is true that *Hanson* held (although on an analysis since superseded by decisions of this Court) that there was nothing unconstitutional in Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh (1970), which authorizes railroad employers to make collective agreements requiring all employees in a given bargaining unit to pay dues and fees to the exclusive-bargaining representative of the unit as a condition of employment.

On the cursory look which the Michigan courts have given it, perhaps *Hanson* would seem to dispose of the present case, in favor of the appellees. However, as we repeatedly contended below, First-Amendment challenges to state-action may not properly be rejected upon cursory inspection. We argued there, as we do here, that:

A. *Hanson* was as a molehill is to a mountain when compared to the largely subsequent development of the unconstitutional-conditions principle.

B. In any event, *Hanson* is distinguishable in that it dealt only with private-sector employment, not public-sector employment, and that in confining itself to the private sector it did no more than confirm the ancient common-law privilege of private employers to condition employment on either membership or nonmembership in a labor organization.

C. Indeed, *Hanson* would have to be regarded as implicit authority for the Teachers–if held relevant to this case at all–inasmuch as it broadly suggested that serious First-Amendment questions would be raised by a statute which permitted a *private* employer to impose the agency-shop in favor of a union–if in the same statute there were no limit on the authority of the union to use dues and fees derived from the agency-shop to finance political and ideological programs.

Here, not only do we deal with public employment, in contrast to the private employment involved in *Hanson*; but we are confronted with a statute which has been authoritatively construed as permitting unions to use forced agency-shop contributions to finance their political and ideological activities (A. 101)–the very kind of authorization which the Court in *Hanson* said would raise grave constitutional issues not then before it. 351 U.S. at 235, 238.

Finally, in a thorough misreading and misapplication of the cases succeeding *Hanson*–*i.e.*, *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963)–the court below reasoned from them that the Teachers had no standing to sue and that the relief they sought had been precluded by those cases. We show *infra* pp. 200-05 that *Street* and *Allen* simply have nothing to do with this case; that, being confined to the private sector and its categorically different constitutional status, and dealing with a statute prohibiting use of compelled dues for political purposes, those cases are devoid of any significance whatsoever as precedents *here*.

A.

Hanson would be incompatible with the unconstitutional-conditions principle if applied to public employment, and should therefore either be distinguished from this case, overruled, or held superseded by subsequent constitutional development.

Hanson reversed a Nebraska Supreme Court ruling to the effect that §2, Eleventh of the Railway Labor Act was unconstitutional. It rested this reversal in part on the premise that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments." 351 U.S. at 238. While recognizing these facts about the case, we shall demonstrate that *Hanson* is neither dispositive nor even applicable here.

We show *infra* pp. 191-99 that, as a private-sector case expressly warning of a serious constitutional question should it appear that the Railway Labor Act authorized unions to use forced contributions to finance their political activities, *Hanson* is both significantly distinct from this case and at least suggestive authority for the Teachers. At this point we bring to the Court's attention how dramatically the approach taken in *Hanson* differed from the approach the Court was beginning to take in the unconstitutional-conditions cases which preceded *Hanson*–*e.g.*, *Wieman v. Updegraff*, 344 U.S. 183 (1952)–and which it consummated in those which came later–*e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

These and other similar cases have required, where state-action *prima facie* infringes First- and Fourteenth-Amendment freedoms, the most convincing proof of the

necessity of such infringement, even where merely incidental to the achievement of a "paramount" or "compelling" state interest. *Supra* pp. 115-20. The Court in *Hanson* imposed no such requirement; indeed, it dealt sketchily with all constitutional issues.[37] This is undoubtedly why Justice Douglas, the author of the *Hanson* opinion, came in a few years to look upon it with disfavor, if not distaste. He said of it:

> I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.

Lathrop v. Donohue, 367 U.S. 820, 884 (1961) (dissenting opinion) (footnote omitted).

If the Court were to conclude here that *Hanson* is not significantly distinguishable from the present case, and that it is authority in favor of the constitutionality of the Michigan

[37] *Compare* 351 U.S. at 233-37, and the brief constitutional analysis scattered over the relatively few lines of text on those pages, *with* the Court's insistence upon an exhaustive demonstration of a compelling state interest in such cases as *Kevishian*, *Pickering*, *Robel*, and *Sindermann*, to say nothing of the many other cases which we consider *supra* pp. 115-20. As a matter of fact, the Court in *Hanson* applied only the "rational-basis" test – and that in the briefest of forms. It said: "Congress, acting within its constitutional powers, has the final say on policy issues. * * * The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises." 351 U.S. at 234. If Mr. Justice Brennan, dissenting, had reasonable grounds for deploring as "minimal" the Court's review of the justification for a challenged employment-application form in *Washington v. Davis*, 44 U.S.L.W. 4789, 4799 (U.S. Jun. 7, 1976), he would have to call the Court's review in *Hanson* at the very most "*sub*-minimal". Though confronted with a First-Amendment challenge in *Hanson*, the Court required no showing of a compelling or paramount state interest and inquired not at all into the question – which was to become so critical in subsequent First-Amendment Cases – whether the invasion of individual rights was confined as closely as possible to the least-restrictive means.

PERA, it would be confronted with a hard choice. It would have to choose between overruling *Hanson* or virtually abandoning the unconstitutional-conditions principle. For if this Court were to hold that Michigan may condition its public employment on a surrender by state employees of their First- and Fourteenth-Amendment freedoms of speech, association, and political autonomy, without at least demonstrating a compelling state interest, it is very hard to see what would be left of the unconstitutional-conditions doctrine.

However, we do not believe that there is any need to overrule *Hanson* or even to abandon it to rust away on the narrow-gauge constitutional sidetrack where it sits. What must be understood here is how categorically distinct the facts in *Hanson* were from those of this case. Once this is seen we shall also see why *Hanson* was disposed of on the basis of what would now be considered an inadequate constitutional standard.

B.

Hanson need not be overruled since it may be distinguished as a pre-emption case which merely confirmed the common-law privilege of private employers to condition employment at will.

Hanson is categorically distinct from this case on both the facts and the relevant law. Despite the Teachers' best efforts to bring home these distinctions to the courts below, those courts have persisted in blindly clinging to the false theory that *Hanson*, in some vague way, relates to this case notwithstanding the controlling differences between the two in both fact and law.

In the first place, *Hanson* was a private-sector case. The employing railroad was a private company, its employees were private employees, and the union was a private association. Starting with Part I.A. of this brief, we have shown that there

is a fundamental difference between the constitutional and legal rules applicable to private employers and those applicable to public employers, an especially pronounced difference since the development of the unconstitutional-conditions principle. We have seen that at common law employers are privileged—in the absence of statutes or exceptional common-law rules to the contrary—to condition their offers of employment on either membership or nonmembership in a labor organization. *Supra* pp. 10-15 and cited authorities.

We have also demonstrated, as Mr. Justice Stewart observed in *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961), that the "state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Supra* pp. 15-17. And we have described at considerable length how it came about, as a result of such limitations on the authority of public employers, that they may not condition public employment on a waiver or surrender of First- and Fourteenth-Amendment liberties. *Supra* pp. 21-34.

Since the constitutional and legal rules applicable to public employers are radically different from those applicable to private employers, and since *Hanson* dealt exclusively with private-sector employment, *there is no conceivable way in which it could have passed upon the issues involved in this public-sector employment case.*

Let us review what was done in *Hanson* in the light of these elemental considerations. *Hanson* held (with an important reservation which we consider *infra* pp. 195-99) that Congress could permit private employers to require their employees in appropriate bargaining units to provide financial support to the exclusive-bargaining representatives of those units. "The union shop provision of the Railway Labor Act is only permissive", Justice Douglas pointed out. "Congress has not compelled nor required carriers and employees to enter into union shop agreements." 351 U.S. at 231.

From this merely permissive legislation, Justice Douglas inferred that there was enough "governmental action" in the case to justify at least a meagre constitutional inquiry. *See id.* at 231-32. It is interesting and instructive to pursue the "state-action" hypothesis of *Hanson*, even if only briefly. For example, we may ask how Congress could possibly have created a constitutional question by merely allowing employers and unions to negotiate a union-shop contract vastly more limited than they had every right to negotiate at common law. We know that as a general rule employers and unions were privileged at common law to negotiate even full closed shops. That being true, there would seem to be no constitutional infirmity in Congress' merely permitting the parties to do what they had a common-law privilege to do. Indeed, if there were any valid ground for constitutional complaint in *Hanson* on "state-action" theory, it would seem to belong to the union and the employer, since *their* common-law and constitutional contract rights were limited to the negotiation of a narrow type of agency-shop in contrast to the unlimited types of compulsory-unionism agreements, including the full closed shop, generally allowed at common law.

When pressed in this manner, *Hanson* displays a rather unfortunate porousness. But we are required to bring home these characteristics in order to emphasize that *Hanson* was strictly a private-sector case, and as such totally inapplicable here. It is only marginally admissible even into the more amorphous category of "state-involvement" cases. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952). And even when so classified, it has nothing to say about the First-Amendment rights of public employees in a pure and true state-action case such as this. We may concede that "somewhere, somehow" there was state-action in *Hanson* sufficient to evoke a constitutional discussion. *Terry v.*

Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring). But that concession marks the utmost limit of *Hanson's* applicability here. *Hanson* said neither that public employment *could be* conditioned on a surrender of First-Amendment rights, nor that it could *not* be. It simply said nothing on the subject.

We respectfully submit that the most satisfactory way to classify *Hanson* is as a pre-emption case. While it is true, as we have already noted, that there was some First-Amendment discussion in the opinion, it must be remembered that there was also a question of the power of Congress to authorize the union-shop in a state such as Nebraska, where all forms of compulsory unionism are prohibited. 351 U.S. at 227-30. The first, and we believe the most significant, holding in *Hanson* was that under the Supremacy Clause the federal authorization of the agency-shop ousted any contrary state law:

> As already noted, the 1951 amendment [of the Railway Labor Act], permitting the negotiation of union shop agreements, expressly allows those agreements notwithstanding any law "of any State." §2, Eleventh. A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur [*sic*] of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State.

Id. at 232 (footnote omitted).

It is well to remember that *Hanson* was decided at a time when the Court was developing both the pre-emption and the unconstitutional-conditions doctrines. The Court had begun in 1953 to hold that the Taft-Hartley Act ousted even state laws which were substantively compatible with it, *Garner v. Teamsters, Local 776*, 346 U.S. 485; and in 1959 it culminated the process, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236. *Hanson* came between these cases, in 1956. With the pre-emption cases, *Hanson* has a definite, substantive relationship. With the unconstitutional-conditions cases it has none. *Cf. Hanson*, 351 U.S. at 238-39, 241-42

(Frankfurter, J., concurring). The U.S. Court of Appeals for the Eighth Circuit has had no trouble at all in seeing that *Hanson* is irrelevant to public-sector employment. *Knight v. Alsop*, No. 76-1051 (May 17, 1976). This Court should help the Michigan courts to achieve a similar level of enlightenment.

C.

Hanson is authority in favor of the Teachers insofar as it suggests that compelling even private-sector employees unwillingly to support a union's political and ideological activities would invade their rights under the First Amendment; and despite its apparent holding to the contrary, the Michigan Court of Appeals agreed with this contention.

The opinion of the court below is a study in double-talk and evasion. It relies upon *Hanson* and it distinguishes *Hanson*. It declares that the Michigan PERA "could" violate the Teachers' rights but that somehow it does not. It disposes of their case, finally, on a meretricious procedural point drawn from *Hanson's* successors–*Street*, 367 U.S. 740, and *Allen*, 373 U.S. 113–two cases which have even less to do with this one than *Hanson* has; for *Street* and *Allen* were not constitutional decisions at all. *See infra* pp. 200-05.

Observe, for example, how the Michigan Court of Appeals begins its discussion of the relationship between *Hanson* and the present case:

> In *Railway Employes' Department v. Hanson* * * *, the Supreme Court considered the question whether a union shop agreement forces workers into idealogical [*sic*] and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights.

(A. 100).

But Hanson *did not consider this question.* On the contrary, every member of this Court who commented upon *Hanson* carefully noted that the issue was reserved. Thus in the main opinion in *Hanson* itself, written by Justice Douglas, we find this language:

> It is argued that compulsory membership will be used to impair freedom of expression. *But that problem is not presented by this record.* Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, or assessments." If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.

351 U.S. at 238 (emphasis supplied). Again, Justice Frankfurter, concurring in *Hanson*, 351 U.S. at 242, emphasized that

> The Court has put to one side situations not now before us for which the protection of the First Amendment was earnestly urged at the Bar. I, too, leave them to one side.

And still again, Mr. Justice Brennan, in *Street*, 367 U.S. at 749, similarly noted the narrowness of the issue decided in *Hanson:*

> [A]ll that was held in *Hanson* was that §2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give "financial support" to unions legally authorized to act as their collective bargaining agents. We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which "all employees shall become members of the labor organization representing their craft or class." Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees.

We have already noted that Justice Douglas came to repent *Hanson* and urged that it be confined narrowly to its facts, a way of saying that it should be given no value as a precedent. *Supra* p. 190. We do not here intend to use *Hanson* as a precedent and respectfully suggest that the Court not allow the appellees to do so, either; for as to them it is worthless. However, we should be remiss if we failed to observe that the Court was extremely uneasy, and that Justice Black was positively up in arms, in *Street* over the possibility that *Hanson* might come to stand for the proposition that the agency-shop had passed muster under the First Amendment. *See* 367 U.S. at 786-87.

Only such extreme uneasiness could have produced the drastic amendment of §2, Eleventh of the Railway Labor Act which we find in the opinion of the majority in *Street*—where the constitutional question left open in *Hanson* had to be confronted because the record there, in *Street*, replete as it was with evidence that the union involved engaged heavily in political and other ideological activities, left the Court no alternative. No alternative, that is, but one: to read into §2, Eleventh a restriction which plainly had not been placed there by Congress. *Compare Street*, 367 U.S. at 746-50, *with id.* at 801-03 (Frankfurter & Harlan, JJ., dissenting). Purely in order to avoid the constitutional issue left open in *Hanson*, the majority in *Street* held, despite the statutory language to the contrary, that there was implicit in §2, Eleventh a limitation on the uses to which unions might put compelled agency-shop contributions. *Id.* at 768-69. Justice Douglas's special concurrence in *Street*—a study in excruciating embarrassment if there ever was one[38]—indicates how

[38] "[S]ince the funds here in issue are used for causes other than defraying the costs of collective bargaining, I would affirm the judgment below with modifications. Although I recognize the strength of the arguments advanced by my Brothers BLACK and WHITTAKER against giving a 'proportional' relief to appellees in this case, there is the practical problem of mustering five Justices for a judgment in this case. * * * So I have concluded *dubitante* to agree to the one suggested by MR. JUSTICE BRENNAN * * *." *Street*, 367 U.S. at 778-79 (Douglas, J., concurring).

nervous the majority was on the question of the constitutionality of the agency shop—*even in the private sector.*

Now, if the majority was so concerned over the validity of the agency-shop even in the private sector, where the unconstitutional-conditions principle is inapplicable, one may confidently suppose that compelled agency-shop contributions in the public sector would induce a much greater degree of uneasiness. And this uneasiness would be exacerbated by a public-sector agency-shop authorization, such as we have in this case, which the Michigan Court of Appeals itself construed as containing no limitations on the uses to which the Union might put the exacted dues and fees (A. 101).

After stating that *Hanson* had "considered" a constitutional issue which, as we have seen, this Court had explicitly *reserved*, the Michigan Court of Appeals remarkably proceeded to say that *Hanson* "did not consider" this issue (A. 100). Even more remarkably, the Michigan Court then declared that, since the Michigan PERA permits agency-shop dues and fees to be used for political and ideological purposes, the agency-shop clause as authorized by the PERA "could" violate the Teachers' constitutional rights (A. 101-02).

We are never told what was meant by this "could." For the Michigan court, in a blinding and indeed stupefying display of impermissible juridical and ratiocinative legerdemain, then held that since it read *Hanson's* progeny—*Street* and *Allen*—as denying the kind of relief sought by the Teachers here, they were not entitled to any relief at all (A. 102-04).

There are so many errors in this final holding that a separate section is devoted to them. *See infra* pp. 199-205. Here we must conclude with perhaps the most remarkable fact of all: *viz.*, that while giving the impression that it was relying on *Hanson* to rule against the Teachers, the Michigan Court of Appeals did not actually rely on *Hanson* at all, but distinguished it (A. 100); and that what appears to be a

decision *against* the Teachers is actually *for* them *on the constitutional merits* but against them—and only narrowly so—on an irrelevant, incompetent, and immaterial consideration of a pair of decisions which, as we shall show next, have nothing at all to do with this case.

We must not lose sight of the main burden of this section, however. We have demonstrated, we believe, that to the extent that it is relevant at all, this Court's decision in *Hanson* is suggestive authority in favor of the Teachers.

IV.

The Teachers had standing to sue, and the injunctive relief they sought was in all respects appropriate.

There can be no doubt, after consulting the decisions of this Court in similar cases, that the Teachers had standing to sue and that the injunctive relief they prayed was not only *an* appropriate remedy but indeed the *only* remedy for the unconstitutional conduct here challenged. Once one has been compelled to fund repugnant political and ideological activities, the harm is done. The Teachers here, like all others who suffer restraint of their civil rights, can never be provided a genuinely adequate remedy at law. That is why, one may suppose, this Court has developed liberal standing rules and been generous with injunctive relief especially in First-Amendment cases. *See infra* pp. 206-14.

The Michigan Court of Appeals ignored this Court's decisions on standing and injunctive relief in constitutional cases as steadfastly as it ignored the unconstitutional-conditions precedents. Presumably for lack of genuine authority for the conclusion it had determined to reach, the Michigan court made do with some fabricated authority. It cited and quoted in support of its rulings on standing and injunctive relief, this Court's decision in *International Association of Machinists v.*

Street, 367 U.S. 740 (1961) (A. 102-04). However, we are compelled regretfully to point out that, besides being irrelevant here, since it was not a constitutional decision at all, *Street* happens also not to stand for the propositions for which the Michigan Court of Appeals cited it as authority.

A.

Street and _Allen_, the authorities relied upon below to deny the Teachers standing to sue and any right to injunctive relief, were statutory interpretations, not constitutional adjudications, and hence not controlling here; moreover, the court below misinterpreted those cases, holding them authority against the Teachers when actually they favor the Teachers' claims.

We have already described the erratic course which the Michigan Court of Appeals took with respect to the relevance of *Hanson* to this case: first suggesting that *Hanson* had upheld the constitutionality of the agency-shop generally, then conceding that *Hanson* had really not passed upon the issue presented here, and finally concluding with the climactically inconclusive remark that the PERA agency-shop authorization "could" violate the Teachers' constitutional rights (A. 102).

One might have expected the Michigan Court of Appeals at that point to have gone on to elaborate the circumstances which would give intelligible content to the vague and conditional expression, "could". Disappointing this expectation, the court below veered precipitately instead to the true but unrelated remark that "this is not a true class action" (A. 102-03). From there it slid to the inaccurate assertion that *Street* limited relief in such cases as this to only "those Detroit teachers who have specifically protested the use of

their funds for political purposes to which they object" (A. 103). And from *there* it moved in a crescendo of blended irrelevance and error to the incorrect conclusion that *Street* precluded the kind of injunctive relief which the Teachers seek.

1.

As statutory interpretations,* Street *and* Allen *could not have disposed of the Teachers' claims, either procedurally or substantively, because those claims are constitutional in character, as the court below itself held.

As we have already explained, *Street* was in no sense a constitutional decision. On the contrary, it narrowly limited §2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh (1970), precisely in order to avoid the constitutional issue reserved in *Hanson*. 367 U.S. at 749-70. The court below, however, has conceded not only that the Teachers' claim is constitutional in character, but that it "could" be valid (A. 101-02). In such circumstances it should have gone without saying that the *Street* holdings on standing to sue and on the propriety of injunctive relief were of no relevance in this case; for hardly any proposition is clearer than that "non-constitutional standing doctrines must yield to the policy of prompt vindication of First Amendment rights." *National Student Association v. Hershey*, 412 F.2d 1103, 1119 n.46 (D.C. Cir. 1969), *citing Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965). Quite clearly, the Michigan Court of Appeals erred in holding, with no attempt whatsoever at justification, that the standing rules *attributed* to *Street* were conclusive against the Teachers.

But the worst is yet to come. The court below did more than rely upon an irrelevant precedent. It also misread that precedent.

2.

Street *and* Allen *both held that objections to the improper use of compelled dues were timely if made for the first time in the complaint.*

The Michigan Court of Appeals denied the Teachers' petition in part because, citing *Street* as authority for this requirement, they "made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object" (A. 104). Anyone who takes the trouble to read *Street* with some diligence will see that it is not authority for any such requirement. As a matter of fact, *Street* expressly declared that registering objections for the first time in the complaint or in the subsequent proceedings would sufficiently ground the action:

> The appellees who have participated in this action have *in the course of it* made known to their respective unions their objection to the use of their money for the support of political causes. In that circumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes.

367 U.S. at 771 (emphasis supplied). Mr. Justice Brennan, the author of the *Street* opinion, also wrote the Court's opinion in *Allen*, where he said:

> Respondents [dissident employees] first made known their objection to the petitioners' [unions'] political expenditures in their complaint filed in this action; however, this was early enough. *Street*, 367 U.S., at 771.

373 U.S. at 113 n.6.

To its erroneous ruling regarding the timing of the protest which it saw as a prerequisite to standing in this case, the Court of Appeals put yet another inaccurate gloss on *Street*. It inexplicably proceeded to declare that in order to preserve his recognized First-Amendment rights a dissenting employee "must make known to the union those causes and candidates

to which he objects" (A. 104). Not only does one search the *Street* opinions in vain for such a requirement, but it is directly contrary to the holding of *Allen* that:

> [i]t would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union.

373 U.S. at 118.

There can be no doubt that the Teachers, notwithstanding the contrary holding of the Michigan Court of Appeals, met the *Street* and *Allen* requirements. The record is clear. In the complaint in which they all joined, they made objections easily as specific as those in *Allen* to the agency-shop, on the ground that the money it purported to exact from them was being used and would be used for political purposes of which they disapproved. (A. 12, 48-49.) Moreover, they made offers of proof in support of those charges (A. 21-28)—offers ignored in the courts below in their haste to dispose of the case by the judgment on the pleadings demanded by the appellees.

How the Michigan Court of Appeals could have affirmed that judgment in reliance upon *Street* is beyond understanding. Even if *Street*, a statutory decision, were fully determinative of the standing aspects of this constitutional case, the fact is that the Teachers satisfied its pleading and standing requirements, and those of *Allen* as well.

3.

Contrary to the holding below, infringements of First-Amendment rights are peculiarly subject to injunctive relief, and* Street *so implied.

The Michigan Court of Appeals said that in a case such as this "the Supreme Court made it clear in *Street* that injunctive relief is not the proper remedy" (A. 103). This too is a misreading of *Street*. More likely than not this mistake

was brought about by the Michigan court's reliance upon a quotation from *Street* which was separated from its proper context and thus conveyed a distorted conception of what the Court in *Street* really had said about the availability of injunctive relief. Perhaps if the Michigan court had read the whole of the relevant statement by this Court, it would have concluded that the comment had no applicability to a case such as this, where the complaint seeks injunctive relief against a prior restraint of First-Amendment activity; for such is its plain import:

> [The dissident employees'] right of action stems not from constitutional limitations on Congress' power to authorize the union shop, but from §2, Eleventh itself. In other words, appellees' grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds.

367 U.S. at 771. This statement, which immediately precedes the one quoted out of context by the Michigan Court of Appeals, clearly recognizes that there is a significant difference between a case in which complaint is made against the uses to which validly extracted funds are put and one in which the complaint challenges the constitutionality of the extraction itself, as the Teachers do here (A. 13, 49-50). Only after this distinction was made did the Court go on to say, in the part quoted by the Michigan Court of Appeals (A. 103):

> We think that an injunction restraining enforcement of the union-shop agreement is therefore plainly not a remedy appropriate *to the violation of the Act's restriction on expenditures.* Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant union's performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

367 U.S. at 740 (emphasis supplied).

There is no way in which the *complete* opinion in *Street* concerning the propriety of injunctive relief can properly be construed as militating against the Teachers here. Setting aside all other considerations for the moment, we must emphasize that the Teachers here have *not* asked for an injunction restraining the Union from spending voluntarily contributed funds in any way that the Union and its members wish: they have asked only that they be relieved of the prior restraint which enforcement of the agency-shop against them would impose upon their First-Amendment rights of free speech, free association, and political autonomy.[39]

The whole of this Court's opinion on the injunction issue plainly indicates an awareness that while injunctive relief might be improper in the limited statutory circumstances involved in *Street*, a different conclusion as to the propriety of injunctive relief would be reached in a case in which a valid constitutional claim was made. Indeed, the Court that decided *Street* is the same one which has established the unconstitutional-conditions principle and implemented it in case after case with injunctive relief against abridgments of First-Amendment rights. *Cf. supra* pp. 21-34. In fact, it is a commonplace of constitutional law that nothing but injunctive relief can provide an adequate corrective to restraints of First-Amendment rights. *See infra* pp. 210-14. By definition, prior restraints upon speech, association, and political autonomy can be adequately dealt with in no other way if those basic rights are to be preserved.

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[39]The *Abood* Teachers at all times have sought relief only on their own behalf, since they did not cast their complaint as a class action (A. 50-52). And the *Warczak* Teachers also sought relief on their own behalf as well as on behalf of a class of nonunion Detroit teachers (A. 13-15). Surely there is no rule of law, of procedure, or of common sense which declares that complaints must be dismissed as to named plaintiffs even if it is true, as the Michigan Court of Appeals stated, "that this is not a true class action" (A. 102). In both *Street*, 367 U.S. at 771-75, and *Allen*, 373 U.S. at 120-24, the case was remanded to the lower courts for the fashioning of relief for the plaintiffs, not for dismissal.

B.

Constitutional doctrine applied by this Court in the overbreadth and prior-restraint cases establishes the Teachers' standing to challenge the constitutionality of the agency-shop scheme.

The dismissal of the Teachers' attack upon the constitutionality of the agency-shop statute was affirmed by the Michigan Court of Appeals in part on the ground that they lacked standing to challenge the Union's use of compulsory fees for political activities (A. 104). But in order to reach this conclusion, the Michigan court had to ignore this Court's teaching on the standing of parties to challenge state-action which allegedly deters privileged First-Amendment activity. The relevant doctrine has been succinctly stated recently in a case brought by public employees attacking state-action which precluded them from joining a labor union and bargaining collectively:

> It has become almost an axiom of law that the prospective chilling of First Amendment rights will give a party standing to challenge an allegedly invalid legislative enactment.

Vorbeck v. McNeal, 407 F. Supp. 733, 738 (E.D. Mo. 1976) (three-judge court), *aff'd mem.*, 44 U.S.L.W. 3737 (U.S. Jun. 21, 1976).

Neither the appellees nor the court below denied that the agency-shop statute and contract provision require the Teachers financially to support the Union or be discharged. All of the Teachers have alleged that they have refused to pay the required service fees and that the Board intends to discharge them for non-compliance with the contract provision (A. 11, 46, 48); the *Abood* Teachers have further alleged that they have in fact been threatened with discharge

for failure to pay the fees (A. 47).[40] Finally, the Teachers have alleged that the agency-shop infringes their First-Amendment freedoms because it requires them to subsidize unwillingly the Union's political and ideological activities as a condition of their employment (A. 12-14, 48-50). "This proceeding * * * meets the requirements of defined rights and a definite threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint." *United Public Workers v. Mitchell*, 330 U.S. 75, 92 (1947); *see Cramp v. Board of Public Instruction*, 368 U.S. 278, 280-85 (1961).

The Michigan Court of Appeals recognized that the issue of "whether or not funds collected pursuant to an agency shop clause could constitutionally be used for purposes unrelated to collective bargaining * * * is squarely before us in the case at bar" (A. 100). This concession comes as no surprise in view of the allegations of the complaints just described and the Teachers' contentions on appeal that §10 of the PERA on its face abridges their First-Amendment freedoms because it sanctions the use of compelled service fees for political and ideological purposes (A. 80-83). Moreover, the appellees conceded before the Court of Appeals that the issue of "whether there is any constitutional infirmity in the agency shop clause in question *or in the Act authorizing it*" was *"squarely presented"* by the appeal (R., Brief of Defendants-Appellees at 5, Mich. Ct. App., Jul. 19, 1974) (emphasis supplied).

This, then, is a classic First-Amendment "overbreadth" case. The Teachers have alleged a present infringement of

[40]The appellees will undoubtedly assert that many of the Teachers have voluntarily paid service fees. Anticipating this, we point out that under the duress of repeated threats of discharge from the Board and the Union, some of the Teachers have paid service fees *involuntarily* and *under protest* (R., Supplemental Memorandum in Opposition to the Federation's Suggestion of Partial Mootness at 4-9, and attached Affidavits, Mich. Ct. App., Sept. 17, 1974).

their freedoms not to associate and not to speak resulting from the operation of an overbroad statute (and state-agency "rule" promulgated under it), and have alleged the threatened penalties for its violation. Even more tellingly, the Court of Appeals *explicitly held* that the statute is overbroad in precisely the sense asserted by the Teachers: "[I]t is clear that the amendment sanctions the use of nonunion members' fees for purposes other than collective bargaining" (A 101). Misapplying the irrelevant "protest" requirement of *Street* and *Allen*, however, the Michigan court then ruled that the Teachers could not raise the very constitutional question it recognized as being before it.

The overbreadth-standing doctrine applied by this Court in case after case does not permit such a result. Even if the Michigan courts had presumed (in spite of the well-pleaded allegations of the complaints) that the Union makes no political expenditures from the Teachers' coerced fees, or that they do not object to any such expenditures actually made, the Teachers would still have had standing to challenge the constitutionality of the state's authorizing the use of coerced agency-shop fees for political and ideological activities. As Mr. Justice Brennan said for the Court in *NAACP v. Button*,

> we will not presume that the statute curtails constitutionally protected activity as little as possible * * *. [T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights *whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.*

371 U.S. 415, 432 (1963) (emphasis supplied). Thus the Court has recognized that standing exists in First-Amendment cases even though the complainant has not demonstrated that he has personally suffered from an unconstitutional application of the challenged overbroad statute. *E.g., Bigelow v. Virginia*, 421 U.S. 809, 815-16 (1975) (speech and press);

Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972) (picketing); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (speech); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (association and assembly); *see Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965).

Very recently, a unanimous Court invoked the overbreadth-standing doctrine to permit the operators of two "topless-dancing" bars, *against whom no criminal prosecution was pending*, to seek declaratory *and injunctive relief* against an ordinance which prohibited any female from appearing "topless" in any public place. The Court held that,

> even though a statute or ordinance may be constitutionally applied to the activities of a particular [party], that [party] may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court.

Doran v. Salem Inn, Inc., 422 U.S. 922, ___, 95 S. Ct. 2561, 2568-69 (1975). And the overbreadth doctrine is applicable to cases challenging statutes the penalty for violation of which is dismissal from public employment, as well as to criminal statutes. *See Shelton v. Tucker*, 364 U.S. 479 (1960); *Soglin v. Kauffman*, 418 F.2d 163, 166-67 (7th Cir. 1969); *cf. Keyishian v. Board of Regents*, 385 U.S. 589 (1967) ("vagueness").[41] Therefore, in the light of *Doran* and its predecessors, the Michigan Court of Appeals clearly erred in denying the Teachers protection against a statute which, it had already held, "could" violate their First- and Fourteenth-Amendment rights (A. 102).

Furthermore, we have already seen how the PERA agency-shop scheme works a prior restraint on the Teachers' First-Amendment freedoms. *Supra* pp. 87-93. The Court of Appeals has judicially "perfected" this scheme by holding that, in order to preserve their rights not to speak and not to associate, the Teachers must first notify the Union of their objections to the use of their compulsory fees for political

[41] "While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech." *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968).

candidates and causes (R. 104)—thus imposing on them the burden of applying for a "permit" to exercise their freedoms. Mr. Justice Stewart, speaking for the Court in *Shuttlesworth v. City of Birmingham*, has explained why this type of imposition cannot bar suit by one challenging a prior restraint:

> [O]ur decisions have made it clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license. "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Jones v. Opelika*, 316 U.S. 584, 602 (Stone, C.J., dissenting), adopted *per curiam* on rehearing, 319 U.S. 103, 104.

394 U.S. 147, 151 (1969) (footnote omitted); *accord, e.g., Freedman v. Maryland*, 380 U.S. 51, 55-57 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958); *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940); *Lovell v. City of Griffin*, 303 U.S. 444, 452-53 (1938).

Finally, as was the case in *Staub*, the Michigan Court of Appeals' holding that the Teachers lacked standing to attack the constitutionality of PERA §10 because they made no protest to the Union "is not an adequate nonfederal ground of decision." 355 U.S. at 319. Therefore, as it did in *Staub*, the Court should proceed here to the merits of the Teachers' claim that the agency-shop statute "is invalid on its face because it makes enjoyment of the constitutionally guaranteed freedom of speech contingent on the will of the [Union] and thereby constitutes a prior restraint upon, and abridges, that freedom." *Id.* at 321.

C.

Injunctive relief is particularly appropriate to remedy the irreparable harm which the agency-shop scheme necessarily causes.

We have already seen that *Street* did not face the question of the propriety of injunctive relief in a case in which a valid First-Amendment claim is made against the constitutionality of the agency-shop itself. *Supra* pp. 203-05. Here, however, particularly if the Teachers are correct in their contention that public-sector collective bargaining is an inherently political process, it *is* appropriate to enjoin the Board and the Union from enforcing their agency-shop agreement against the Teachers.[42] For the mere requirement of financial support of the Union imposed on the Teachers clearly and comprehensively violates essential First-Amendment rights.

This Court has recognized that state-action which deters the exercise of First-Amendment rights necessarily causes the kind of irreparable injury which justifies injunctive relief. *See Allee v. Medrano*, 416 U.S. 802, 814-15 (1974); *Dombrowski v. Pfister*, 380 U.S. 479, 483-89 (1965).[43]

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[42]The *Abood* complaint specifically asked the Wayne County Circuit Court to enjoin the "Defendants from discharging Plaintiffs pursuant to the agency shop clause of the collective bargaining agreement" (A. 51); the *Warczak* complaint, brought before the effective date of the agency-shop clause, requested "such further and other relief as may be necessary, or may to the Court seem just and equitable" (A. 15).

[43]The inferior federal courts have applied the same principle on numerous occasions in First-Amendment cases. *E.g.*, 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1159-62 (2d Cir. 1974) (prior restraint); Katz v. McAulay, 438 F.2d 1058, 1060 n.3 (2d Cir. 1971) (*dictum*), *cert. denied*, 405 U.S. 933 (1972); A Quaker Action Group v. Hickel, 421 F.2d 1111, 1116 (D.C. Cir. 1969) (assembly and petition); Keefe v. Geanakos, 418 F.2d 359, 363 (1st Cir. 1969) (academic freedom); Sheridan v. Garrison, 415 F.2d 699, 705-06 (5th Cir. 1969) (speech), *cert. denied*, 396 U.S. 1040 (1970); Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969) (press); Wolff v. Selective Service Local

(continued)

That this case involves a threatened discharge of public employees, rather than threatened criminal prosecutions as in *Allee* and *Dombrowski*, in no way diminishes the likelihood of irreparable injury to the Teacher's First-Amendment rights. On the contrary, the injury is less problematical:

> In *Baggett* [v. *Bullitt*, 377 U.S. 360 (1964),] and similar cases we enjoined state officials from discharging employees who failed to take certain loyalty oaths. We held that the States were without power to exact the promises involved, with their vague and uncertain content concerning advocacy and political association, as a condition of employment. *Apart from the fact that any plaintiff discharged for exercising his constitutional right to refuse to take the oath would have had no adequate remedy at law, the relief sought was of course the kind that raises no special problem—an injunction against allegedly unconstitutional state action (discharging the employees) that is not part of a criminal prosecution.*

(footnote continued from preceding page)

Bd., 372 F.2d 817, 822, 824 (2d Cir. 1967) (speech and assembly); Locke v. Vance, 307 F. Supp. 439, 444 (S.D. Tex. 1969) (three-judge court); *see* Lewis v. Kugler, 446 F.2d 1343, 1350 & n.12 (3d Cir. 1971) (search and seizure with First-Amendment implications); *cf.* Henry v. Greenville Airport Comm'n, 284 F.2d 631, 633 (4th Cir. 1960) (Fourteenth-Amendment equal protection); Clemons v. Board of Educ., 228 F.2d 853, 857 (6th Cir.) (equal protection), *cert denied*, 350 U.S. 1006 (1956); Wilson v. Board of Supervisors, 92 F. Supp. 986, 989 (E.D. La. 1950) (three-judge court), *aff'd mem.*, 340 U.S. 909 (1951).

In Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974), a taxpayers' suit under the establishment clause of the First Amendment, the three-judge District Court held that "[t]he deprivation of such a fundamental Constitutional right constitutes irreparable harm", and granted a preliminary injunction. 358 F. Supp. at 43. "This Court's affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight." Meek v. Pittinger, 421 U.S. 349, 367 n.16 (1975).

Younger v. Harris, 401 U.S. 37, 46 n.4 (1971) (emphasis supplied). *See Burns v. Elrod*, 409 F.2d 1133, 1136 (7th Cir. 1975), *cert. granted*, 423 U.S. 921 (1975).

These principles mandate injunctive relief for the Teachers even if PERA §10 is struck down solely on the ground of its overbreadth in authorizing the use of agency-fees for political and ideological purposes. For the *primary* harm caused by the expenditure of coerced fees upon political and ideological activism from which public employees dissent is not a mere temporary deprivation of money, curable by damages or "restitution"—the remedy preferred by the Michigan Court of Appeals (A. 103-04). Rather it is the *irreparable* injury caused by the promulgation of ideas, the promotion of causes, the electioneering for candidates, the mobilization of legislative forces, and the purveying of other official influence to which the Union directs such expenditures. This use of the Teachers' money

> damages them doubly. *Its utilization to support candidates and causes [they] oppose renders them captive to the ideas, associations and causes espoused by others.* At the same time it depletes their own funds and resources to the extent of the expropriation and renders them unable by these amounts to express their own convictions and their own ideas and to support their own causes.

Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1004 (9th Cir. 1970).

As this Court has repeatedly said, "[t]here are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation* * *." *Hague v. CIO*, 307 U.S. 496, 529 (1939) (Stone & Reed, JJ., separate opinion). Such is the case here. The harm done to the Teachers cannot be measured simply in terms of the coerced fees spent on the Union's political and ideological activism. And therefore, recovery of damages, or "restitution", would be no real remedy at all. For political and ideological viewpoints once promulgated, and political

influence once applied, cannot be withdrawn from the marketplace of ideas, the voting booth, the legislative chamber, or the negotiating process. A mere monetary judgment against the Union would not cure the *influence* which its use of the coerced fees may have had, for example, on an election. Indeed, it might not even deter the initial malfeasance in the future–since the Union might well consider the immediate and certain impact of expending the monies on partisan activism more valuable than the cost of "borrowing" the funds from the Teachers through the agency-shop scheme. *See Cort v. Ash*, 422 U.S. 66, 84 (1975).

For that reason, an injunction against enforcement of the agency-shop scheme is the *only* adequate remedy in this case. *See Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940).

CONCLUSION

Either the decision below should be reversed and the PERA agency-shop declared unconstitutional on its face as an abridgment of the Teachers' freedoms of speech, association, and political autonomy; or the case should be remanded with a direction that the Teachers be given an opportunity to prove the invasion of their civil liberties that they have alleged.

The decision of the Michigan Court of Appeals is an affront to the Bill of Rights. The Michigan Supreme Court has not covered itself with glory, either, in refusing the Teachers an appeal although they have raised issues which cut directly to the center of the most profound constitutional challenges of our time: the threats posed simultaneously to personal freedom and to popular sovereignty by compulsory public-sector unionism.

Unlike some cases in which the Court has applied the unconstitutional-conditions principle, this is one where in defending individual liberty it can at the same time help safeguard also the basic principle of the American polity:

popular sovereignty. For in denying the Michigan officials constitutional authority to combine with the Union at the expense of the Teachers' civil liberties, the Court will check to some degree the potential of public-sector unionism for distorting, if not overwhelming, the normal processes of popular, representative, government.

Surely the Court did not fashion the unconstitutional-conditions principle for the benefit only of those persons who associate with others in challenging our form of government, or who prefer to attack truths long held, or who, as is their inalienable right, delight in treating American symbols and institutions with scorn. The Bill of Rights can not be that crabbed and cramped. There must be room in the generous mansion of the Constitution in which the liberties also of those who favor old American principles of individual autonomy and popular sovereignty may find quiet sanctuary.

We respectfully urge the Court to vacate the decision below and order entry of judgment for the Teachers. Reversing the Michigan Court of Appeals will bear out for the Teachers the promise held forth in the Bill of Rights. It will also serve the community. It will reassure the nation that the Constitution protects equally the civil rights of all Americans. It will demonstrate that the Members of this Court can be relied upon to find in the Constitution equal protection for both those who defend and those who attack basic American institutions.

If the Court does not deem it proper flatly to hold the agency-shop statute unconstitutional on its face, we respectfully request that it at least reverse and remand this case with directions that the Teachers be provided an opportunity to prove, as they have alleged, that their

liberties are being abridged to no valid public purpose. This much, we believe, is their right.

Respectfully submitted,

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